98TH CONGRESS
1st Session

SENATE

REPORT No.
98-3

SHIPPING ACT OF 1983

REPORT

OF THE

SENATE COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION

ON

S. 504

TO IMPROVE THE INTERNATIONAL OCEAN COMMERCE TRANSPORTATION SYSTEM OF THE UNITED STATES

FEBRUARY 17 (legislative day, FEBRUARY 14), 1983.—Ordered to be printed

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Mr. GORTON, from the Committee on Commerce, Science, and Transportation, submitted the following

REPORT

[To accompany S. 504]

The Committee on Commerce, Science, and Transportation, having considered an original bill (S. 504) to improve the international ocean commerce transportation system of the United States reports favorably thereon and recommends that the bill do pass.

PURPOSE OF BILL

The Shipping Act of 1983 revises the Shipping Act, 1916, to provide an updated, simplified, more efficient, responsive, and effective regulatory scheme for international liner shipping. The paramount objective of this regulatory scheme is to develop and maintain an efficient and flexible ocean transportation system through commercial means, with minimum Government involvement, in order to better serve the needs of U.S. foreign commerce.

This Committee believes the time is ripe to revise the principal maritime regulatory statute, the Shipping Act, 1916, in order to:

(1) end the uncertainty and delay that surrounds U.S. Government regulation of ocean liner shipping, by providing a predictable legal regime and streamlined regulatory process administered and enforced by a single independent Federal agency (the Federal Maritime Commission (FMC)).

(2) harmonize U.S. shipping practices with those of our major trading partners, especially by reaffirming antitrust immunity for certain carrier and conference activities.

(3) equalize Federal regulatory and judicial treatment of U.S.- and foreign-flag carriers.

(4) provide both large and small shippers with a responsive and flexible, as well as predictable, ocean transportation common carrier services.

(5) allow carriers and shippers to take advantage of the technological advances in ocean liner shipping and intermodal transportation which have developed since 1916.

(6) maintain a system of free trade and access by U.S. carriers to foreign trades.

BACKGROUND

GENESIS OF THE SHIPPING ACT, 1916

In the 2 years immediately prior to World War I, the House Committee on Merchant Marine and Fisheries conducted an in-depth investigation of the liner shipping industry operating in the foreign commerce of the United States.[1] Prompted by alleged abuses of the Sherman Act,[2] their inquiry revealed that the prevailing practice worldwide involved individual carriers cooperating through a conference system. That system has been described as follows:

The conference system, which is essential to achieving these objectives, has been summarized as follows:

A shipping conference is a voluntary association of ocean carriers operating on a particular trade route between two or more countries. The purpose of a shipping conference is the self-regulation of price competition, primarily through the establishment of uniform freight rates and terms and conditions of service between the member shipping lines. . . . By operating within an internally regulated conference, carriers seek mutual restraint from the pursuit of sharp business practices and rate tactics that result in unstable economic consequences. . . .

The most often discussed attribute of a conference system is its collective control over rates. Generally, conference members are required by their conference agreements to charge uniform rates established by the vote of the membership. Conferences, however, often provide for "open rates" on specified commodities, which allow individual carriers to negotiate rates with the shippers without consideration of a conference-prescribed rate.

In order to protect their operations from economic attack by nonmembers, and thus to assure their members of a sufficient supply of cargo to sustain their long-term commitment to the particular trade, conferences typically employ shipper loyalty mechanisms, such as dual rate systems, which tie shippers to the services provided by the conference members.[3]

The conference system, they found, had developed in response to the fact that the ocean liner industry is highly capital intensive, leading individual lines to attempt to fill their vessels through intense price competition, which, if not controlled, would result in excessive and destructive competitive practices.

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[1] Report on Steamship Agreements and Affiliations in the American Foreign and Domestic Trades, 4 House Committee on Merchant Marine and Fisheries. Proceedings in The Investigation of Shipping Combinations under House Resolution 587, 63d Congress (1913).

[2] Act of July 2, 1890 (ch. 647, 26 Stat. 209), as amended.

[3] See, Mason, "The Relationship and Parallel Development or Economic Regulation and Antitrust Enforcement in the Ocean Common Carrier Industry," in "Proceedings: in search of a rational liner shipping policy," a Northwestern University transportation forum, (1978).

The Committee agreed that the conference system could not operate legally in U.S. trades without express immunity from the application of the antitrust laws of the United States. The U.S. trades, however, were served by many foreign-owned companies as well as U.S. operators, and U.S. imports and exports were also the imports and exports of many foreign nations with fully equal interest in our commerce. In the face of the unusual characteristics of international economic competition, the Alexander Committee concluded that some degree of immunity from the antitrust laws should be granted to liner operators in our foreign commerce. In its report, issued in 1914, the Committee commented:

. . . that open competition cannot be assured for any length of time by ordering existing agreements terminated. The entire history of steamship agreements show that in ocean commerce there is no happy medium between war and peace when several lines engage in the same trade. Most of the numerous agreements and conference arrangements discussed in the foregoing report were the outcome of rate wars, and represent a truce between the contending lines. To terminate existing agreements would necessarily bring about one of two results; the lines would either engage in rate wars which would mean the elimination of the weak and the survival of the strong, or, to avoid a costly struggle, they would consolidate through common ownership. Neither result can be prevented by legislation, and either would mean a monopoly fully as effective, and it is believed more so, than can exist by virtue of an agreement. Moreover, steamship agreements and conferences are not confined to the lines engaging in foreign trade of the United States. They are as universally used in the foreign trade of other countries as in our own. The merchants of these countries now enjoy the foregoing advantages of cooperative arrangements, and to restore open and cutthroat competition among the lines serving the United States would place American exporters at a disadvantage in many markets as compared with their foreign competitors.[4]

To protect against certain disadvantages and abuses of the conference system, the Committee prescribed effective government regulatory control. As a result, shortly after enacting the Clayton Act,[5] Congress enacted the Shipping Act, 1916, which, with certain modifications, continues in force today.

EROSION OF CARRIER ANTITRUST IMMUNITY

While several provisions of the Shipping Act, 1916, need to be revised and updated, reform of section 15 of the act is crucial to any effort to eliminate the confusion which currently characterizes government regulation of ocean liner shipping.

Section 15 sets forth four grounds upon which an agreement may be disapproved. The FMC may not approve any agreement which it finds to be unjustly discriminatory or unfair, detrimental to the commerce of the United States, contrary to the public interest, or violative of the Act. All other agreements must be approved.

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[4] Id footnote 5.

[5] Act of October 15, 1914 (ch. 323, 38 Stat. 730), as amended.

In construing these standards, the Commission has concluded that demonstration that an agreement would violate the antitrust laws absent immunity, alone, is substantial evidence that the agreement is "contrary to the public interest," unless other evidence is produced that detracts from the weight of that factor. This tends to subordinate the transportation factors (which the Alexander Report found to favor concerted liner activities) to antitrust principles. Weighing antitrust principles against countervailing transportation factors is often a complex and time-consuming process; and the uncertainty and delay that result from the structure of the 1916 Act and its interpretations have thus served largely to undermine its objectives.

In many cases, carriers are unable to secure timely approval of agreements for concerted activity and tying arrangements which give conferences their requisite commercial strength and viability (e.g., rate-making agreements; intermodal arrangements; pooling agreements; joint service ventures; rationalization agreements; discussion agreements; and inter-conference agreements). Even when approval is secured, there remain valid fears of prosecution under the antitrust laws should the parties' conduct subsequently be found to exceed the permissible bounds of the agreement or to be otherwise in violation of the Shipping Act. This has occurred despite congressional intent to treat the foreign waterborne commerce of the United States differently from other commerce and industries subject to the antitrust laws of the United States.[6]

The first challenge to the Commission's primary jurisdiction over liner carrier agreements came in *United States Navigation Co.* v. *Cunard Steamship Co.* (284 U.S. 474 (1932)). In *Cunard* it was alleged that a conference, through the use of exclusive patronage contracts with certain shippers, had entered into and engaged in a conspiracy to restrain trade in violation of the Sherman and Clayton Antitrust Acts. The activities complained of had not been submitted to nor approved by the Shipping Board, the predecessor of the present FMC. The Supreme Court, in unanimously affirming two lower courts, declared that:

> In any event, it reasonably cannot be thought that Congress intended to strip the board of its primary original jurisdiction to consider such an agreement and "disapprove, cancel, or modift" it, because of a failure of the contracting parties to file it as §15 requires. A contention to that effect is clearly out of harmony with the fundamental purposes of the act and specifically with the provision of §22 authorizing the board to investigate *any* violation of the act upon complaint or upon its own motion and make such order as it deems proper. And whatever may be the form of the agreement, and whether it be lawful or unlawful upon its face, Congress undoubtedly intended that the board should possess the authority primarily to hear and adjudge the matter. For the courts to take jurisdiction in advance of such hearing and determination would be to

[6] See, Fawcett and Nolan; and, "Antitrust and Shipping Regulation in the United States," Report of the Committee on Ocean Liner Conferences, the "Maritime Law Association of the United States (1978)."

> usurp that authority. Moreover, having regard to the peculiar nature of ocean traffic, it is not impossible that, although an agreement be apparently bad on its face, it properly might, upon a full consideration of all the attending circumstances, be approved or allowed to stand with modifications.

Twenty years later, the Supreme Court followed its rationale in *Cunard* in holding that the United States could not enjoin under the antitrust laws conference agreements that had not been submitted to the Federal Maritime Board for approval (*Far East Conference* v. *United States,* 342 U.S. 570 (1952)).

It thus had been clearly settled that (1) antitrust statutes were not paramount where the actions complained of were reachable by remedites provided in the Shipping Act, and (2) remedies for violating section 15 were to be found within the provisions of that act.

(a) The Effect of Later Case Law

In *Carnation Co.* v. *Pacific Westbound Conference* (383 U.S. 213 1966)), the Supreme Court distinguished *Cunard* and *Far East Conference,* stating that those cases required the courts to defer to the Commission's primary jurisdiction only in instances where such deference is necessary to avoid conflict between the courts and the Commission. The Court stated:

> Although the Commission can approve prospective operations under agreements which have been implemented without approval, respondents concede that the Commission has no power to validate preapproval implementation of such agreements. Therefore, *Far East* and *Cunard* principles only preclude courts from awarding treble damages when the defendant's conduct is arguably lawful under the Shipping Act.[7] *Carnation* thus increased antitrust exposure and subjected the regulated shipping industry to potential treble damage liability under the antitrust statutes and reparations liability under the Shipping Act.

The role of the antitrust laws in the regulatory scheme of international ocean shipping was further expended 2 years later in *Sabre Shipping Corporation* v. *American President Lines.*[8] In *Sabre,* an FMC hearing examiner had found that the rates of the conferences involved had a "predatory" effect on Sabre Line, a non-conference carrier in the trade, and the conferences' rates were therefore "so unreasonably low as to be detrimental to the commerce of the United State" within the meaning of section 18(b)(5) of the Shipping Act. Sabre then sued in federal district court for treble damages under the antitrust laws. The disrtict court reasoned that even though the rates of the defendant conferences had been set pursuant to FMC-approved section 15 agreements, the finding of a Shipping Act "violation" operated to retroactively strip the conferences of section 15 antitrust immunity for those "unlawful" activities. Consequently, a treble damage claim would lie.[9]

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[7] *Carnation Co.* v. *Pacific Westbound Conference,* 383 U.S. 213, 222 (1966).

[8] 285 F. Supp. 949 (S.D.N.Y. 1968), aff'd sub nom. Japan Line, Ltd v. Sabre Shipping Corp., 407 F. 2d 173 (2d Cir.) cert. denied, 395 U.S. 922 (1969).

[9] See Fawcett and Nolan, p. 555.

(b) The Svenska Presumptions

The 1961 amendments to the Shipping Act [10] added a fourth test to section 15, requiring that an agreement be disapproved where it was found to be "contrary to the public interest." While there may be some dispute over what Congress intended "public interest" to mean within the context of section 15, it seems clear that Congress intended to retain the presumption in favor of section 15 agreements, with the burden upon opponents to prove they should not be approved.[11]

Nevertheless, in *Federal Maritime Commission* v. *Aktiebolaget Svenska Amerika Linien* (390 U.S. 238 (1968)), the Supreme Court upheld an FMC decision creating a presumption that a conference restraint which interferes with the policies of antitrust laws is "contrary to the public interst"; the court held that such an agreement will be approved only if the proponents could then demonstrate that the restraint is required by a serious transportation need, necessary to secure important public benefits, or in furtherance of a valid regulatory purpose of the Shipping Act. This presumption elevated antitrust principles to a position of new importance in section 15 proceedings.

CONSEQUENCES OF THE EROSION OF CARRIER ANTITRUST IMMUNITY

Though the Shipping Act, 1916, originally was designed to validate the conference system and to insulate it from the antitrust laws of the United States, the combined impact of subsequent case law on section 15's antitrust protections for the conference system has rendered those protections largely illusory. Conferences act at their peril in conducting the very activities that the Shipping Act contemplates they will undertake, because the FMC and the courts usually view such activities as anticompetitive combinations which are presumptively contrary to the public interest.

In the Committee's view, the present situation has resulted in such major regulatory problems as:

(1) Delay in the FMC's approval process for section 15 agreements sometimes stretching on for years.

(2) Application of vague standards of approvability for section 15 agreements and subsequent loss of predictability in regulatory decisionmaking.

(3) Conflicting views of executive branch agencies concerning acceptable conference practices, as well as shifting decisions by the FMC and the courts, have created confusion over the responsibilities of the conferences and the Government's regulation of conference activities.

(4) A "chilling effect" on the efforts of carriers cooperatively to arrive at rational commercial arrangements to improve U.S. participation in our liner trades, increase operational efficiency, and promote comity with our trading partners. These efforts not only face constant risk of opposition from the Antitrust Division of the Department of Justice, but have exposed

[10] Act of October 3, 1961 (P.L. 87-346; 75 Stat. 763).
[11] See, Fawcett and Nolan, p. 551.

all parties to prosecution or the threat of prosecution under the U.S. antitrust laws.

NEED FOR LEGISLATION

ANTITRUST IMMUNITY

The judicial and administrative evolution of shipping policy has limited the flexibility of the conference system and, not at all incidentally, has annoyed our international trading partners, who do not agree with the theory of our antitrust laws as they relate to international commerce. Though the United States undoubtedly possesses the sovereign authority to enforce her antitrust laws in her international shipping trades, this Committee firmly believes it is in our best interests to harmonize our regulation with international practice. The margins of acceptable conduct have been unclear and the protection of the antitrust immunity granted by the Commission tenuous. The chilling effect, the uncertainties, and the inefficiencies forced by antitrust exposures have plaqued carriers of all flags serving our foreign trade.

Clear antitrust immunity also marks a major step in revitalizing our maritime industry because it removes a major handicap created by uneven enforcement. U.S.-flag carriers domiciled in this country are totally exposed to all U.S. laws and regulations pertaining to liner shipping, including the full brunt of unexportable domestic antitrust policies. while foreign carriers generally evade the thrust of those same U.S. laws and regulations. Foreign carrier exposure is limited by the locus of records and documentation overseas, beyond the reach of subpena and FMC section 21 orders, and by "blocking statutes" erected by the governments of our major trading partners who do not share our antitrust philosophy. These blocking statutes enacted by 12 countries[12] in response to U.S. efforts to enforce its shipping and antitrust laws, prohibit the production of evidence or testimony by witnesses pursuant to subpenas issued by the FMC. The British Government, for example, has recently enacted a law entitled "Protection of Trading Interests Act, 1980." That act provides that the British Secretary of State may direct any person in the United Kingdom not to comply with another country's laws insofar as they attempt to regulate actions outside of the other country to the detriment of British trading interests. It also authorizes the Secretary to prohibit compliance with foreign court orders that encroach upon the jurisdiction of the United Kingdom. The law also prohibits a British court from enforcing certain multiple damage awards (including treble damages) against United Kingdom citizens, and permits them to recover the part of such multiple damage awards which exceeds actual compensation.

To make matters worse, the Justice Department has objected to many pooling, space-charter, joint venture or consortia proposals that include U.S. carriers, but has rarely, if ever, intervened when such agreements are confined to foreign carriers. Consequently, U.S. carriers have become reluctant even to seek authority to oper-

[12] U.S.S.R., Sweden, Norway, Denmark, Federal Republic of Germany, the Netherlands, Belgium, Great Britain, France, Spain, Greece and Japan.

ate by the same efficient methods for which foreign carriers receive frequent approvals from our own government. Exposure to the antitrust laws and the heavy burden of justification before the Commission have deprived U.S.-flag carriers in particular, from potential pricing and cost benefits that could be achieved through the economics of rationalized or joint services. At the same time foreign carriers can make arrangements or concessions to improve their competitive position, often by providing shippers outside of the United States with benefits on routes other than those to or from the United States.

By clearly authorizing rationalizing arrangements with complete antitrust immunity and by restricting dual enforcement by the Justice Department as well as the Commission, this bill would eliminate much of the unequal effect of our regulation on U.S.-flag operators.

In making its determination to legislatively overturn *Svenska*, and its progeny, the Committee also was persuaded by several other commercial factors.

First, "open competition", which can be expected to seriously weaken the conference system, cannot be assured for any length of time. Thus even theoretical benefits associated with such competition would be temporary. Afterwards, the U.S. liner fleet, U.S. exporters and importers, the public, and our national security would pay the price.

Furthermore, conferences and other agreements for economic cooperation are not confined to the lines engaging in the foreign trade of the United States. They are universally used in the foreign trade of other countries as well as in our own. The merchants of other countries now enjoy the foregoing advantages of cooperative arrangements. Making open and cutthroat competition possible among the lines serving the United States would place American exporters at a disadvantage in many markets as compared with their foreign counterparts.

Second, in the event of the "price-cutting" envisioned by "open competition", it would not be the efficient low-cost carriers who would survive. There are many state-controlled carriers in international shipping. Moreover, other merchant fleets are so heavily subsidized by their governments or so closely integrated with their governments' national objectives that their operations primarily serve their respective nation's economic, political, and military policies. Where this is the case, the carriers can afford to operate without regard to traditional profit and loss consideration. In either event, their governments will intercede in the marketplace if they believe that their best interests are no served by the marketplace solution.

Third, unlike domestic surface transportation, demand for international liner transportation is inelastic. Thus the lower prices which competition theoretically brings with not generate more cargo in a trade. Moreover, since ocean transport costs averaged approximately 8 percent of value, significant reductions of such a small cost component would be unlikely to increase the amount of cargo, even if the demand were elastic.

Fourth, in international ocean liner shipping, the route to reduced unit costs and cargo rates is the attainment of higher load

factors. The ocean liner industry is characterized by a very high proportion (75 percent) of fixed costs. This is the reverse of most industries where only 25 percent of costs are fixed.

With this kind of cost structure, far greater benefits can be obtained from high vessel utilization than from increased competition generated by adding to the number of liner services, operating in a trade. The latter increases the vessel tonnage operated without increasing the aggregate of cargo tonnage available to the handled, thus increasing the cost of doing business.

Fifth, if it is to operate efficiently, the liner industry is far more dependent on the coordination of service than other forms of transport (efficiency ship capacity in reasonable relationship to the volume of cargo offered).

Cargo cannot move in or out of a trade in short-run response.

Ocean liner service differs from domestic common carriers since the unit in which service is produced (the ship) is much larger in relation to available traffic volume than the units with which domestic carriers produce their service.

Not only is vessel capacity large in relation to total trade-route volume, it is especially so in relation to individual shipments. A containership may draw its individual cargo from several hundred shippers.

Finally, there are enormous capital and other constant costs in the liner industry. Today, a new container ship costs about $100 million. Not only are the vast majority of cost (such as for crew and fuel) fixed, but a vessel voyage takes significantly longer than air transport movements which have proved somewhat more amenable to open competition. Thus, once the commitment to make a sailing in made, the asset is tied up for a longer period of time, and the need to keep utilization as high as possible increases.

The Committee strongly believes that it is in our national interest to permit cooperation among carriers serving our foreign trades to permit efficient and reliable service. Our shippers need: stable, predictable freight rates than can be relied on when bidding or quoting in their foreign markets; frequent, reliable, well-tailored service to keep inventories at minimal levels while meeting market demands; a choice of responsive and efficient carriers who do not force them to subsidize empty space, old engines, or excessive crew. Our carriers need; a stable, predictable, and profitable trade with a rate of return that warrants reinvestment and a commitment to serve the trade; greater security in investment; regulatory parity with foreign competition; and expeditious and predictable regulatory supervision.

OTHER NECESSARY LEGISLATIVE REFORMS

While the present Commission has made substantial and admirable progress, regulatory delay in the administrative process has caused hardship to parties seeking approval of section 15 agreements. Because there is no statutory time limit on Commission action, these delays have raised serious questions about the extent to which the present regulatory environment is responsive to the needs of the public which requires decisions that are reached

promptly and fairly. In the Committee's view, justice delayed is justice denied.

The effectiveness of the dual rate contract system as a tying device has also been questioned. Under the dual rate system a shipper agrees to give all or some fixed portion of its patronage to the contracting conference carriers. In return, the shipper is granted a percentage discount (commonly 15 percent) from the rates applicable to those shippers which do not enter into such an agreement. A shipper who fails to abide by its exclusive patronage agreement with the conference members and utilizes a non-conference carrier in violation of the conference shipper contract is subject to damages and loss of contract privileges. Critics of the system maintain that its obligations are too easily circumvented, and its relative inflexibility adds little incentive for shippers to observe its terms and conditions.

The advent of intermodalism has caused another serious problem which threatens the efficiency of our liner services to the detriment of both conferences and shippers. In the late 1960's, the technical innovation of containerization made possible new economies of scale and thus promised the potential for substantial reductions in real costs to vessel operators and shippers. As a consequence, containerization became rapidly established on the most important U.S. trade routes. The full benefits of containerization can only be realized, however, when a container moves between shipper and consignee or between inland consolidation centers without breaking bulk. Under these circumstances, additional economies are derived from the speed with which intermodal transfer takes place, from savings in the labor and "storage" costs associated with this process, and from cost reductions in packaging and insurance as well as substantial reduction in damage and pilferage claims.[13] The FMC has approved conference agreements which authorize intermodal rates.

The Department of Justice, however, has taken a position contrary to the FMC, claiming that the Commission has no authority to approve conference agreements providing for the fixing of through intermodal rates and that such agreements therefore violate the antitrust laws. This uncertainty regarding antitrust immunity inhibits conferences in U.S. trades from agreeing among themselves on the charge to quote shippers who choose to use conference facilities for the inland leg of a foreign door-to-door movement[14] and it clearly frustrates the growth of an innovative, efficient, and economical transportation service.

Many other issues regarding the need to modernize the Shipping Act have arisen, including the necessity to: permit the establishment of shippers' councils and negotiation of service contracts and time-volume rates; insure the right of conference carriers to exercise independent action; clarify the authority of the Commission to investigate violations of the act by shippers and consignees; clearly require independent self-policing; amend the definition of common

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[13] See "Liner Shipping in the U.S. Trades." A University of Wales Institute of Science and Technology Study for the Council of European and Japanese National Shipowners' Association (CENSA) (1978).

[14] Ibid.

carrier to specifically include non-vessel-operating common carriers, and to prevent the exclusion of U.S. carriers to foreign trades.

BALANCING AND INTERESTS OF SHIPPERS AND CARRIERS

It has always been the intention of the Committee to balance the needs of carriers and shippers. While the U.S. liner fleet is an essential component of our economic and national defense structure, shippers are the backbone of our economy. Practically speaking a shipper is the consumer of ocean shipping services. They are exporters and importers who range from an association of small orchardists who seek to export a relatively few containers of fruit each year, to automobile and chemical manufacturers, upon whom hundreds of thousands depend for employment. Also closely tied to the shipper concerns are the nation's ports, whose interests are best served by a large and steady flow of commerce.

Thus the Committee has consistently sought to reconcile the naturally conflicting interests of shippers and carriers, and is particularly proud of achieving the appropriate balance the fact that shippers—the consumers of ocean services, employers, manufacturers, agricultural and timber producers—believe this bill will benefit themselves, suggests significant benefits to the nation's economy as a whole.

(a) Shipper Concerns

Shippers commenting on this bill and its predecessors raised a number of issues which were resolved by specific provisions added by the Committee prior to reporting the bill to the Senate:

1. Shippers sought to establish clearly that shippers and carriers are equal partners in negotiating the scope of any loyalty contracts, so that such contracts may be tailored to meet the commercial needs of both parties. The loyalty contract provisions of the bill reflect this objective. Loyalty contracts must be offered on equal terms and conditions (section 7(a)(1)); must release shippers promptly where space is not available (section 7(a)(2)); must permit use of competing services when operating beyond the geographic scope of the contract (section 7(a)(5)); and establish standards for resolution of disputes under the contract (section 7(a)(5)).

2. Shippers' Councils are authorized and small shippers are permitted to combine cargoes to take advantage of rates available under time-volume arrangements and service contracts.

3. Ocean conferences are required to maintain and observe consultation and complaint procedures (sections 5(c)(5) and 5(c)(6)).

4. Shippers specifically sought language prohibiting conferences from allocating shippers among individual conference members. This protection now appears as section 12(c)(7).

5. At shipper requests, a new section 13 has been added which establishes special investigation procedures for pooling agreements and joint venture arrangements.

6. Again at shipper requests, antitrust immunity is confined to agreements properly on file with the FMC, and activities reasonably believed to be pursuant to such agreements.

7. Shipper requests for a study to examine further regulatory reforms have been honored by express direction to the General Accounting Office to undertake such a study and to file a thorough report within 2 years of the effective date.

In addition to these measures which specifically respond to recent requests and observations of the shipper community, there are several other major provisions of the bill which protect the shipper-carrier balance which is the objective of this Committee:

—Section 8(b) makes clear that the authority of conferences to publish intermodal rates will not act to extend antitrust immunity to inland modes;

—Tariff provisions in section 9 give shippers notice of rate levels and rate increases;

—Refund provisions in section 9(e) protect shippers against overcharges by carriers;

—The "Prohibited Acts" section of the bill (section 12) is drafted to afford shippers protection against a broad range of potential abuses of collective powers by carriers;

—Section 12(d)(3) forbids the disclosure of sensitive cargo information, the knowledge of which could cause harm to shippers;

—Authority to enter into service contracts or to offer rates variable with time and volume commitments should promote greater pricing flexibility and responsiveness to the unique needs of particular shippers both large and small;

—Penalties for violating the law have been strengthened by increasing the amount of fines that may be assessed, particularly for knowing and willful violations, and by expanding actions subject to suspension of tariffs; and

—Any aggrieved party can file complaints and seek reparations for any injury it has suffered.

All these provisions, whether carried forward from existing law or inserted in this bill at the express urging of shippers and their representatives, provide a balance between the rights and obligations of both carriers and shippers. It is this balance which is the hallmark of the bill. It has been a guiding principle for the work of this Committee, and the basis for endorsement of this bill, as reported, by shippers.

(b) Carrier Concerns

A new statutory framework, establishing a new regulatory philosophy, is needed to allow carriers and shippers to conduct international trade in a stable, efficent, and fair manner. It must place a new emphasis on harmonizing U.S. policies and practices with those of our trading partners and removing the handicaps which our laws have imposed upon our own carriers. Domestic rules of competition may work at home and fully justify recent deregulatory approaches to reexposing domestic transportation to the antitrust laws; they have been proven, however, not to work in international liner shipping.

This bill recognizes that such phenomena as containerization, State-controlled fleets, the aspirations of less developed nations to possess merchant fleets, and cargo sharing arrangements by multilateral or bilateral measures were not even dreamed of when the Shipping Act, 1916, was enacted.

The Committee believes that preservation of the Conference system is essential not only to the maintenance of a strong U.S. merchant fleet but for the reliable and efficient flow of trade in the U.S. foreign commerce. This does not mean the conference will necessarily be the best choice of carrier or shipper, but merely that it should be permitted where commercial considerations warrant its use.

Carriers have been suspended between supposed antitrust immunity, by statute, and huge antitrust exposure, in fact. They have been required to prove their actions would not violate the antitrust laws in order to obtain antitrust immunity. They have been discouraged from cooperating to achieve operating efficiencies under the same law Congress designed to encourage such activities. And they have been subjected to multiple jeopardy for Shipping Act violations; Civil penalties, criminal sanctions, and private treble damage actions. The basic maritime policy of maintaining a privately-owned merchant marine has become increasingly difficult because of the inability of U.S.-flag ships to maintain a reasonable market share. What we have given with our promotional hand, we have taken away with our regulatory hand. At the very least our regulatory law has to set all carriers serving our trades on par and permit U.S. carriers to compete without handicaps preordained by their own nations's law. Otherwise, no amount of promotional aid will persuade private individuals to invest in the U.S. maritime industry: we would be "marching up the hill and marching right down again."

Legislative History

This bill has its genesis in legislation studied and debated in both the Senate and House of Representatives in each of the past 5 years. As of the date that this Committee ordered this bill reported, a total of 68 days of hearings had been held in the two Houses of Congress since 1977 on the issues addressed by this bill. Over that period testimony has been received from hundreds of witnesses, and compiled in many volumes of records. The ample record has established the need for maritime regulatory reform.

During the 96th and 97th Congresses, this Committee held extensive hearings on a series of proposals intended to serve as a catalyst for legislation thought necessary to produce a unified and consistent regulatory policy which is responsive to the realities of international ocean shipping.[15]

Among witnesses representing all segments of the maritime shipping and carrier industry there was broad agreement on the need to clarify the exemption of concerted activity in ocean shipping from the U.S. antitrust laws; establish clearer standards and procedures, including time limits, for approval of agreements under section 15; allow greater flexibility in the type of discount-rate and service contracts offerred by carriers and conferences; authorize

[15] Ocean Shipping Act of 1979: Hearings on S. 1460, S. 1462, and S. 1463, before the Subcommittee on Merchant Marine and Tourism of the Senate Committee on Commerce, Science, and Transportation, 96th Congress, Serial No. 96-77, and staff working draft of Proposed Ocean Shipping Act of 1980, and comments thereof, Ocean Shipping Act of 1981—Hearings on S. 1593 and S. 125.

the approval and implementation of intermodal agreements; and permit the establishment of shippers' councils, in order to balance the interests of shippers and carriers.

In 1980, the Senate passed unanimously S. 2585, the Ocean Shipping Act of 1980. However, similar efforts in the House (H.R. 4769 and H.R. 6899) failed to reach fruition during the 96th Congress.

In the 97th Congress, Senators Gorton, Packwood, Stevens, Kasten and Inouye introduced S. 1593, and Senator Inouye introduced S. 125. A compromise agreement was reached by all U.S. flag carriers and major shipper representatives to seek clarifying modifications to several sections of S. 1593, principally regarding independent action, loyalty contracts, and service contracts. These were incorporated into S. 1593 before the bill was reported. The legislation however, was never presented to the full Senate for its consideration.[16]

On the first day of the 98th Congress, January 25, 1983, Senators Gorton, Packwood, Stevens, and Inouye introduced S. 47. Senators Kasten and Trible soon joined as cosponsors. S. 47, as introduced, was modeled on S. 1593, but did incorporate certain provisions designed to address additional antitrust concerns and shippers needs which had become evident during the previous Congress.

A hearing concerning S. 47 was held on February 2, 1983, by the Committee. Testifying were proponents of the legislation, including the administration, the FMC, and representatives of small shippers, large shippers, and carriers. Even though the vast majority of parties which would be affected by reform of ocean liner shipping regulation have voiced strong support for legislation, such as S. 47, the Committee sought out opponents of the bill to testify at the hearing. Due to the extensive record already compiled on the issues addressed in S. 47, the Committee structured the hearing to allow spokespersons for the proponents and opponents equal time to present their arguments.

Issues addressed by the witnesses included the impact of the legislation on competition in general, ports, small shippers, jobs, balance-of-trade, ocean rate levels, and the adequacy of Federal Maritime Commission regulation and enforcement:

—Opponents of the bill had claimed that its enactment would raise shipping rates by as much as 20 percent. This figure was never substantiated. On the contrary, the Committee received testimony from shippers who will actually have to pay the tariffs, that enactment of S. 47 could well reduce ocean shipping rates.

—Despite testimony that the effect of the bill would be to harm small shippers, small shippers themselves testified that S. 47 would help them obtain better ocean transportation service at favorable rates.

—A position paper of the representative association of American ports countered claims by one witness that the bill was inimical to ports' interests.

—The Committee heard suggestions that penalties under the shipping act were insufficient to discourage prohibited activities, and were substantially less than antitrust treble damages

[16] In 1982, the House passed by a vote of 350–33, H.R. 4374, the Ocean Shipping Act of 1982.

penalties. This was rebutted by presentation of a comparison of potential penalties as calculated under the antitrust laws as opposed to the significantly higher penalties that can be assessed by the FMC under S. 47.

—Finally, the Committee received testimony from a large shipper representing a broad variety of U.S. companies, that S. 47 will allow increased competitiveness of U.S. exporters in foreign markets, and thus result in domestic employment benefits and improved balance of payments.

Substantial written comment was received from various shipper organizations. They sought changes in S. 47 to reflect certain shipper protections developed during the 97th Congress during consideration of this legislation in the House of Representatives. Since the purpose of S. 47 is to improve the regulation of ocean liner transportation in a manner to benefit both carriers and shippers, the Committee adopted many of the shippers proposals.

These focus on the need for oversight over pooling arrangements and joint ventures, the restriction of antitrust immunity to these agreements approved by the Federal Maritime Commission, prohibiting the allocation of shippers among conference carriers, the need for small shippers to combine shipments in order to benefit from new authority provided in S. 47 for shippers and carriers to develop time-volume rates and service contracts, and the burden of proof regarding exceptions from loyalty contracts.

In addition, the Committee adopted a revision of existing law in order to more effectively prevent exclusion of U.S. flag carriers (and consequential increased cargo rates) by foreign nations or carriers.

Confident that with these changes the bill would benefit both carriers and shippers, the Committee unanimously ordered S. 47 reported on February 15, 1983. The committee also ordered than an original bill, identical to the S. 47 as reported by the Committee, also be reported to the Senate. This original bill (S. 504) was reported on February 17, 1983 by Senator Gorton.

SUMMARY OF MAJOR PROVISIONS

This bill includes the following major substantive changes to existing law:

Places regulation of international liner shipping under a single law, motivated by a unified set of policies, and administered by a single agency.

Clarifies and reaffirms the complete antitrust immunity of ocean liner shipping operators engaged in specified collective activities.

Clarifies authority for conferences of carriers to establish intermodal rates and services.

Authorizes shippers to form shippers' councils to consult and confer with ocean carriers on general rate levels, rules, practices, or services.

Requires any conference utilizing loyalty contracts to grant its members the right to take independent action.

Eliminates pre-implementation approval of agreements required to be filed with the FMC; provides for suspension of agreements, prior to their taking effect, pending review; streamlines procedures

for review of agreements; replaces vague standards of review with a precise list of prohibited acts; sets statutory time limits on Commission action; and places the burden or proof squarely on opponents.

Permits ocean carriers to enter loyalty contracts with shippers, if they meet certain specific requirements, without prior approval.

Clarifies the authority of carriers to discount rates for shippers moving a specified volume of cargo over a specified period of time and to enter contracts for rates and services subject to common carrier obligations of the act. Allows small shippers to combine shipments in order to obtain such discount rates.

Eliminates the FMC's ability to scrutinize rate levels (except those of "controlled carriers"), while preserving the FMC's role as repository of tariffs and enforcer of tariff adherance consistent with ensuring common carrier services.

Prohibits certain practices of conferences designed to drive independent carriers from our trades.

Estimated Costs

In accordance with paragraph 11(a) of rule XXVI of the Standing Rules of the Senate and section 403 of the Congressional Budget Act of 1974, the Committee provides the following cost estimate, prepared by the Congressional Budget Office:

U.S. Congress,
Congressional Budget Office,
Washington, D.C., February 16, 1983.

Hon. Bob Packwood,
Chairman, Committee on Commerce, Science, and Transportation, U.S. Senate, Washington, D.C.

Dear Mr. Chairman: Pursuant to section 403 of the Congressional Budget Act of 1974, the Congressional Budget Office has reviewed S. 47, the Shipping Act of 1983, as ordered reported by the Senate Committee on Commerce, Science and Transportation, February 15, 1983.

The Shipping Act of 1983 reforms the existing maritime regulatory scheme by clarifying those maritime shipping activities that are exempt from antitrust laws. The bill permits ocean common carriers to make agreements regarding the fixing of rates, the pooling of traffic, and the rationalization of service. In addition, the bill allows the creation of shippers' councils to consult and confer with ocean common carriers regarding rate levels, charges, rules and services, and allows small shippers (as defined by the bill) to consolidate cargo and negotiate time-volume and service contracts with ocean common carriers.

Under this bill, agreements filed with the Federal Maritime Commission (FMC) become effective 45 days after filing, unless specifically rejected. The Shipping Act of 1983 requires open conferences in the U.S. trades, mandates the right of independent action within the conference system, and lists specifically prohibited activities.

By amending the existing Section 15 approved acts standards of the Shipping Act of 1916, CBO expects reduced federal government

involvement by both the FMC and the Department of Justice's anti-trust division. FMC, however, will still be the depository for all tariff, rate and shipping agreements and have the authority to license freight forwarders.

Although CBO expects that there would be some reduction in FMC's overall $11 million budget as a result of enactment of this bill, it is not possible to estimate these savings with confidence because of the uncertainty of the revised workload of the FMC. The bill directs the General Accounting Office to report to Congress, within two years of the effective date on the feasibility of further regulatory reforms. There is no specific authorization of appropriations for this activity; however, such a study would cost approximately $50,000 per person-year.

Enactment of this bill would not affect the budgets of state and local governments.

Should the Committee so desire, we would be pleased to provide further details on this estimate.

Sincerely,

ALICE M. RIVLIN, *Director.*

REGULATORY IMPACT STATEMENT

In accordance with paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee provides the following evaluation of the regulatory impact of this legislation, as reported.

The Committee anticipates a reduction in the FMC's regulatory requirements that all concerted agreements and all dual-rate contracts receive FMC approval before implementation.

The routine screening of all agreements, even when uncontested and noncontroversial, has resulted in long delays before business arrangements could be effectuated. Though agreements must still be filed, there will no longer be a need to submit simultaneously to the Commission elaborate justifications of anticipated conduct. The streamlined procedures and time limits, the placement of the burden on opponents, and the replacement of antitrust principles with commercial ones and of vague standards with specific prohibited acts should all substantially reduce the FMC role and the time and cost burden on parties to agreements.

Copies of loyalty contracts no longer need be filed, though a sample must be included in the conference tariff. Tariffs must still be filed with the Commission, so no change in regulatory burden is expected in this regard.

Nevertheless, it is difficult to anticipate to what degree savings in budget and personnel will be possible. It might, for example, be appropriate for the Commission to maintain its present strength, shifting its efforts from preimplementation approval of agreements to postimplementation policing for compliance with prohibited acts. Even in this regard, however, the bill contemplates a major role to be taken by independent neutral policing bodies, thus alleviating some of the FMC's enforcement burden. It should be noted that the FMC has already in the past year reduced its authorized personnel from 366 full-time equivalents to 288.

Finally, by replacing antitrust standards with commercial standards, vessel operators in our international trades should be able to

operate more efficiently, which, in turn, should make U.S. exports more competitive. The bill would have no major impact on privacy.

Section-by-Section Analysis

Section 1.—Title

The bill, if enacted may be cited as the Shipping Act of 1983.

Section 2.—Declaration of policy

The section states the objectives of regulating international liner shipping. They are included to clarify the rationale for regulating at all (many nations do not) and, more particularly, for revising the Shipping Act, 1916 [hereinafter referred to as "the 1916 Act"], as it relates to foreign commerce. Naturally, these objectives should guide interpreters in determining congressional intent and the Commission in promulgating rules and regulations.

To meet the needs of the U.S. foreign commerce, the first objective states the centerpiece of our regulatory policy, to develop and maintain an efficient ocean transportation system through commercial means, with minimum Government involvement. Excessive Government involvement has unnecessarily interfered in may aspects of shipping activity where commercial parties more appropriately should govern their own conduct. Wherever Government supervision could be reduced with confidence that shippers, ports, and independent carriers would remain protected, the bill does so. For example, sections 4, 5, and 6 permit agreements to engage in concerted activity with very little pre-implementation scrutiny by the Commission; section 7 eliminates the requirement that the FMC approve loyalty contracts in advance of their use; section 9 preserves the Commission's function as repository and enforcer of tariffs but not as a reviewer of rate levels,[17] and also clearly authorizes time-volume rates and service contracts; section 12 enumerates specifically prohibited acts that replace vague pre-approval standards applicable to agreements under current law; and section 18 grants the Commission broad exemption power to be used whenever requirements of the act are unnecessary to its regulatory purposes.

The other policy objectives follow from the first one. Principally motivating this revision of U.S. shipping regulatory law is the need to reaffirm that the United States will permit internationally accepted commercial means of meeting the objectives of responsive and efficient ocean transportation service. The bill thus reaffirms and clarifies the authority of ocean carriers to cooperate and coordinate services with antritrust immunity, in harmony with international shipping practices, subject to minimal supervision exclusively the by Commission.

Paragraph (4) recognizes a time honored principle of international law that, quite simply, foreign ocean commerce is a two-way street involving the United States and its foreign trading partners. While the Commission is not expected to abdicate its responsibilities under this bill in the face of foreign opposition, it is encour-

[17] An exception to this statement is set forth in section 10 for controlled carriers who must maintain rates and practices that are just and reasonable.

aged to administer this bill in a way that will minimize conflicts with the interests of our trading partners. On the other hand, foreign carriers must comply with our rules if they are to participate in our trades. Disparity of regulation of liner shipping among trading partners can be harmful to U.S. commerce.

Paragraph (5) states the intent to allow carriers to enter cooperative working arangements to better utilize their capital resources in order to achieve greater efficiencies in their operations with concomitant savings to shippers and improvements in return on investment. Simply because an agreement between or among carriers reduces competition does not mean it is unlawful or contrary to the objectives of this bill. Paragraph (7) clearly enunciates Committee intent that the antitrust laws will have no place with respect to activities and agreements authorized or prohibited under this bill. The Shipping Act, as administered by the Commission, will prescribe the rules, protections, and sanctions necessary to regulate international shipping effectively, in all instances except for secret agreements or agreements that are otherwise not in effect pursuant to the act. The Commission should carry out its responsibilities in a manner that advances the ocean transportation system.

Section 3--Definitions

This section defines all terms used in the bill that require specific explanation. Many are new and those derive from the Shipping Act, 1916, have been revised where necessary to insure clarity or effectuate changes included elsewhere in the bill.

(1) "Agreement" is adapted from section 15 of the 1916 Act.

(2) "Antitrust laws" is adapted from section 15 of the 1916 Act. Any amendments to these acts and acts passed to supplement their coverage are to be included within this definition, though enacted subsequent to this bill.

(3) "Assessment agreement" is adapted from section 15 of the 1916 Act.

(4) "Bulk cargo" is adapted from sections 14b(8) and 18(b)(1) of the 1916 Act.

(5) "Commission" means the Federal Maritime Commission, established by Reorganization Plan Number 7 of 1961.

(6) "Common carrier" means a carrier offering liner service to the general public and does not include ocean tramps or ferryboats. Carriers subject to this legislation are distinguished from water carriers subject to the Interstate Commerce Commission's jurisdiction. The definition also provides that carriers operating solely through ports of contiguous nations are not inlcuded within the terms of the definition. This definition applies only to the extent the passengers or cargo transported are loaded or discharged at a U.S. port. Thus, a liner carrier that accepts U.S.-origin intermodal cargo (or, for that matter, Canadian-origin cargo) at Halifax and calls at Boston for further loading en route to Rotterdam would be a "common carrier" for purposes of the bill only with respect to the Boston-Rotterdam leg of its voyage. This term is used in the subsequent provisions of the bill when the intent is to cover both "ocean common carriers" and "non-vessel-operating common carriers".

(7) "Conference" makes a critical distinction between conference agreements and other types of agreements: conferences are authorized to publish tariffs on behalf of their members. The definition does not include joint service, consortium, and certain transshipment arrangements that also may operate under a common tariff but are not essentially rate agreements in and of themselves; thus the requirements of section 5 (c), (d), and (e) do not apply to these specialized arrangements, whether operating within a conference or outside of a conference. The definition also makes clear that only vessel-operating "ocean common carriers" may be members of a conference agreement.

(8) "Controlled carrier" is adapted from section 1 of the 1916 Act.

(9) "Deferred rebate" is adapted from section 14 of the 1916 Act.

(10) "Fighting ship" is adapted from section 14 of the 1916 Act.

(11) "Forest products in an unfinished or semifinished state" expands the definition of "softwood lumber" contained in section 18(b)(1) of the 1916 Act. It is directed at exempting certain commodities from both the tariff filing and loyalty contract provisions of the bill.

(12) Inland division is that amount paid by the ocean carrier to the inland carrier for the inland portion of through transportation offered to the public by the ocean common carrier.

(13) Inland portion is the charge to the public by the ocean common carrier with respect to the inland portion of through transportation.

(14) "Loyalty contract" is adapted from section 14b of the 1916 Act.

(15) "Marine terminal operator" is adapted from the definition of "other person subject to this act" contained in section 1 of the 1916 Act.

(16) "Maritime labor agreement" is adapted from section 1 of the 1916 Act.

(17) "Non-vessel-operating common carrier" gives statutory recognition to this marine operator who acts as consolidator and intermediary between vessel operators and shippers of less-than-container loads. The shipper status of an NVO, in its relationship with the vessel operator, is intended to accord to NVOs the same protection as is accorded other shippers, such as the prohibition against unjust discrimination.

(18) "Ocean common carrier" is a "common carrier" who operates a vessel in ocean transportation, not including ferries or tramps.

(19) "Ocean freight forwarder" has been redefined to track more closely the functions for which a forwarder receives compensation. The use of the word "dispatches" is intended to exclude from the scope of the term those persons who act only as brokers or agents. It is not intended that booking or space arrangement activity by an ocean common carrier or its steamship agent would make either an "ocean freight forwarder" as well. Clearly, though, one entity might act as both a ship's agent and a forwarder. The definition also deletes the prohibition contained in the Shipping Act, 1916, against a shipper obtaining a forwarder's license. Thus, while a shipper may forward for its own account without obtaining a license (section 11(b)), if a shipper provides forwarding services for

other shippers, it must conform to the licensing and bonding requirements of the legislation. Forwarders outside the United States are not regulated.

(20) "Person" is adapted from section 1 of the 1916 Act, clarified to include individuals.

(21) "Service contract" is a contract between an ocean common carrier or conference and a shipper representing rate and service commitments between the parties; a service contract must be filed and is subject to the tariff filing requirements and common carrier obligations of the bill.

(22) "Shipment" is adapted from section 18(b)(7) of the 1916 Act.

(23) "Shipper" is defined broadly to include any person for whose account the ocean transportation of cargo is provided as well as consignees of such cargo.

(24) "Shippers' council" limits the jurisdiction of the Bill to councils organized under U.S. law (though foreign shippers' councils are mentioned once in section 8(a)(7) to clarify their immunity from U.S. antitrust laws). It also excludes from membership non-vessel-operating common carriers and ocean freight forwarders; thus, under this bill, a shipper who also acts as a licensed ocean freight forwarder would be excluded from membership in a shippers' council. Shippers' councils may include exporters or importers.

(25) "Tariff" is broadly defined and derives in part from section 18(b)(2) of the 1916 Act.

(26) "Through rate" refers to the total amount charged by a common carrier in connection with the continuous transportation between origin and destination.

(27) "Through transportation" means the continuous transportation between origin and destination, for which a single amount is assessed, between a U.S. point or port and a foreign point or port.

(28) "United States" includes the Nation as well as its States, territories, and possessions. Reference in the bill to "United States district court", however, means only Federal court.

Section 4.—Agreements within the scope of act

This is a jurisdictional section describing these agreements must be filed with the Commission pursuant to section 5, and must become effective pursuant to section 6. Once filed and effected, all such agreements and activities pursuant to such agreements are granted antitrust immunity by section 8. No class of agreement however, is relieved from complying with section 12 or other provisions of the act. It describes those types of agreements that are to be subject to Commission jurisdiction. These activities and agreements are exempted from the antitrust laws by section 8. It is not intended, however, to relieve any class of agreement from complying with section 12 or other provisions of the act.

Subsection (a) allows ocean common carriers, among themselves, collectively to: discuss, fix, and regulate rates, accommodations, and services including through rates and services; pool or apportion earnings, losses or traffic; allot ports or restrict or otherwise regulate the number and character of sailings between ports; limit or regulate the volume or character of cargo or passenger traffic to be carried; engage in exclusive, preferential, or cooperative working

arrangements; control, regulate, prevent, competition; and consult and confer with shippers' councils.

With two exceptions, the enumerated activities are essentially identical to those permitted under section 15 of the 1916 Act. First, subsection (a) clarifies both the authority of ocean common carriers to fix through intermodal rates and the Commission's jurisdiction over those intermodal rates and services. There is, however, no authorization for ocean carriers collectively to negotiate rates, divisions, contracts or routes with carriers providing transportation within the United States; these negotiations for inland rates and services must be negotiated one-on-one. Thus the jurisdiction of the ICC over inland carriers is unaffected. Second, specific authority to consult and confer with shippers' councils complements the authority in subsection (c) for shippers to establish councils to consult and confer with the carriers or conferences.

Paragraph (6) of subsection (a), which authorizes carriers to agree to "control, regulate, or prevent, competition," warrants special comment. The immunity granted herein is coextensive with the scope of the antitrust laws. Of course, any activity apparently authorized by section 4, and consequently granted antitrust immunity by section 8, is limited in effect by the prohibited acts of section 12 (and by other requirements of this bill); thus, in particular, carriers could "control, regulate or prevent competition" only insofar as they are not violating other provisions of the bill, such as by engaging in unjustly predatory practices.

Second, it has been proposed that the authority of section 4(a)(6) be limited to actions of carriers affecting competition "among themselves." The Committee, however, concluded that any agreement between carriers that affects competition "among themselves" will almost invaribly affect the competitive posture of other nonconference carriers as well, and the parties must not be left with antitrust exposure for such effects. It is, by specific design, a purpose of the conference to obtain cargoes that would otherwise by transported by existing or potential nonconference carriers. Instead, the focus of the drafters was on ensuring that the prohibited acts and the sanctions for violation were sufficiently drawn to assure adequate protection against abuses of concerted shipping activity under a single act.

Subsection (b) authorizes marine terminal operators, among themselves, collectively to: enter, discuss, fix, and regulate rates; pool or apportion earnings, losses, or traffic; and engage in exclusive, preferential or cooperative working arrangements. These all are activities permitted currently by section 15 of the 1916 act, and are activities currently engaged in by many public port authorities to the general benefit of maritime commerce in general. Subsection (b) also allows marine terminal operators to individually or collectively enter into agreements with one or more ocean common carriers.

Section (c) provides, for the first time, antitrust immunity to shippers, acting through shippers' councils, to confer and agree among themselves and to consult and confer with ocean common carriers or conferences on the broad range of general rate levels, charges, classifications, rules, practices, or services, offered. As a general rule they may not confer upon specific commodity rates;

not may they negotiate, agree, or contract with ocean common carriers or conferences. (Section 4(a)(7) provides reciprocal authority to carriers acting collectively.)

Special treatment is accorded small shippers in Section 4(c)(4). One of the primary benefits to U.S. commerce provided by S. 504, is the authority of carriers to offer discount rates based on time and colume of shipments, as well as to negotiate service contracts. Shippers have sought these improvements in order to gain more flexible and less costly ocean transportation services. The service contract and time-volume provisions are excellent examples of how S. 504 will benefit U.S. commerce and trade as a whole.

The Committee is concerned however that only the larger shippers, whose volume of shipments is sufficient to provide the necessary economies of scale to carriers, will be in a position to obtain the discount rates. Representatives of small shippers testified that the mandatory right of independent action and other provisions of S. 504 will benefit all shippers. The Committee likewise wishes to make the time-volume and service contract benefits available to all shippers.

Thus small shippers are allowed to form shippers councils in order to combine their shipments, and thus provide carriers with the necessary economies of scale to justify discount rates. For the purpose of this provision, a "small shipper" is one who in the ordinary course of business ships an average of 30 or fewer containers a month. The Committee wishes to avoid the possibility of large corporations from combining with others to control extremely large volumes of cargo. Thus, the "small shipper" may not be a division or subsidiary of a company which controls in the aggregate more than an average of 30 containers per month.

The demands of many agricultural or fisheries producers for ocean transportation is highly seasonal. For this reason, "small shippers" who generate more than 30 containers per month, but on the average 30 or less containers per month, would qualify under section 4(c)(4). The period upon which the average is to be calculated is the period of the time-volume contract for which shipments are being combined. Thus, if the time-volume rate is based on carriage over a 10-month period, no individual shipper combining shipments pursuant to section 4(c)(4), may generate over 300 containers itself.

For the purpose of section 4(c)(4) a container refers to a standard sized 40-foot ocean container, or the equivalent thereof: Thus an average of 10 containers per month, for example, would allow 10 40-foot containers, 20 20-foot containers, and 9 45-foot containers.

Those shipping in break-bulk form or roll-on roll-off will be limited to the equivalent capacity of an average of 30 40-foot containers per month.

The Committee recognizes that the right of shippers councils, to actually combine shipments and contract for specific rates, even as constrained by the limitations of section 4(c)(4), constitutes a new innovation. It is hoped that this will result in lower ocean transportation rates, and hence, an improved competitive position abroad for small U.S. exporters. The Committee expects the General Accounting Office report, required under section to review the utiliza-

tion and effectiveness of this provision in the years following enactment of this bill.

Subsection (d) is intended to make clear that this act does not remove mergers and acquisitions in the maritime area from the normal antitrust oversight which might otherwise be conducted by the various agencies of the executive branch.

Section 5.—Agreements

This section sets forth those prerequisites that must be met before any agreement can take effect under section 6(a).

Subsection (a) requires every agreement, written or oral, entered into with respect to activities authorized in section 4 to be filed with the Commission before being implemented by the parties to the agreement.

Under subsection (b), the Commission may establish reasonable regulations regarding the form and manner of filing agreements. This authority does not empower the Commission to prescribe a standardized agreement format for what are esentially contractural arrangements. Agreements which, on their face, do not comply with those regulations or with the other standards of this section may be rejected within 30 days of filing. (Agreements which on their face violate one of the prohibited acts in section 12 could not be rejected summarily under this authority but could be suspended pending a hearing pursuant to section 6.)

Subsection (c) requires conference agreements to include certain elements similar to those currently required by section 15 of the 1916 Act. Open conference membership is mandated and exit penalties are precluded. Independent neutral policing bodies must be engaged by each conference, though the Commission, pursuant to section 18, could grant an exemption where the cost of neutral body self-policing would not be justified given the size of the trade. Conferences must also establish processes for promptly and fairly considering shippers' requests and complaints; this requirement assures that carriers cannot hide behind their collective organization and refuse to be responsive to those who rely on their services.

Conferences utilizing loyalty contracts must grant their members the right of independent action with respect to rates and services ordinarily required to be specified in the applicable common carrier tariff by section 9(a). This statutory right of independent action, however, reaches only those services required to appear in the conference tariff. Time limits are set out in section 5(d), marking the maximum time available under the procedures; independent action may be taken in a shorter time, subject of course to the requirements of section 9(d). An "independent action" rate included in the conference tariff will be the "tariff rate" for purposes of section 7(a)(8) of the bill for those carriers adopting the independent action rate. Therefore, a loyalty contract rate on the commodity involved will be lawful for both those carriers and contract shippers so long as a 15-percent spread or series of spreads from the "independent action" rate is not exceeded.

Independent action must also be permitted for each conference in any agreement between conferences serving the same or different trades that would otherwise be naturally competitive.

Subsection (f) requires shippers' councils to exclude shippers that have no direct financial interest in the export or import of the cargo covered by the agreement. This does not mean that a shippers' council should be commodity specific or commodity oriented, though it may be. There is also no requirement that it be trade specific or trade oriented. Nor is there any effort to limit or prescribe the number or types of shippers' councils that may be established. Membership must be voluntary, and any member can act independently on any matter at any time. Processes for consultation and communication with conferences must be included in a shippers' council agreement; this is a reciprocal requirement to section 5(c)(4), (5), and (6).

Subsection (g) recodifies provisions of section 15 of the 1916 Act added recently by the Maritime Labor Agreements Act (Public Law 96-325). It exempts from Federal Maritime Commission jurisdiction all collective bargaining and related agreements except for agreements or arrangements for the funding of collectively bargained fringe benefits on other than a uniform man-hour basis arrived at without regard to the cargo handled. Consistent with the initial amendments approved in 1980, the remedies applicable to assessment agreements challenged under the Shipping Act, 1916, or this act are limited to "assessment adjustments" which would be "implemented by prospective credits or debits to future assessments or charges, except in the case of a complainant who has ceased activities subject to the assessment or charge, in which case reparation may be awarded."

Rates, charges, regulations or practices of common carriers which are required to be set forth in tariffs continue to be subject to FMC jurisdiction, regardless of whether those tariff matters arise out of or are otherwise related to a maritime labor agreement. This is intended to preserve the essential principle that a common carrier cannot alter its statutory common carrier obligations at the bargaining table and to sharpen the jurisdictional boundaries between tariffs and agreements, leaving the former clearly within the purview of the shipping laws and relegating the latter (with the exception of assessment agreements) to the labor laws.

Section 6.—Action on agreements

For the first time, agreements may take effect without prior approval. Every agreement shall become effective 45 days after filed under section 5, unless either rejected under section 5 in the first 30 days or suspended from taking effect in the first 45 days. An agreement will be suspended for no more than 180 days only when a complainant meets two tests; this procedure permits agreements that either do not pose a reasonable probability of violating 5 or 12 when implemented or create no substantial injury to the complainant to take effect, while protecting the shipping public from agreements that are noxious on their face. Any person alleging substantial injury to itself may file the complaint. Since all agreements must be published in the Federal Register, a potential complainant has approximately 35 days notice before his right to seek suspension is foreclosed.

At present, if the Commission elects to initiate an investigation into the approvability of a newly filed agreement, it must do so without operational data on the actual impact of the agreement. This lack of data requires the Commission to engage routinely in wide-ranging investigations based on allegations and suspicions which may ultimately prove unsupported. Many of the difficulties of the present procedure relate to the speculative nature of Commission review prior to operational experience under the agreement. After an agreement has been in operation for a period of time, proceedings can focus on evidence of actual events and the shipping public will have assurances that agreements will not be marched through the quagmire of formal hearings on speculative or ephemeral matters. This alternation of current procedures would retain the Commission's ability to fully police concerted activity, while eliminating fruitless and time-consuming regulatory hearings.

The Commission can initiate a hearing and investigation, with or without complaint, whether or not a suspension is sought or granted, and regardless of whether or not the agreement has taken effect, to determine if an agreement violates either sections 5 or 12 and, if so, to cancel or modify it. The Commission, however, is encouraged to order hearings when actual operating experience suggests a violation and not when it habors a vague doubt. All proceedings under this section are limited to 180 days duration and the burden of proof is clearly placed on opponents. The 180 day time limit is only a maximum time; a final decision can be reached in as short a time as minimal due process requirements permit. It is conceivable, for example, that an agreement that blatantly would operate in violation of section 12 could be cancelled within 45 days of filing and thus never take effect. An agreement that has taken effect, however, remains in effect pending any investigation and hearing.

The Committee is most concerned about the delays resulting from the traditional stages of formal proceedings at the Commission and commends the Commission's effort to reduce or eliminate such delays by modifying procedures where appropriate. The Committee does not believe that full evidentiary hearings are necessary in every case and suggests that hearings include oral testimony and cross-examination only upon a proper showing that there are genuine issues of material fact or the credibility of witnesses that cannot be resolved on the basis of sworn statements, affidavits, interrogatories, admissions, depositions, or other documents or that the nature of the matters in issue is such that oral hearings and cross-examination are necessary for the development of an adequate record. See *United States* v. *Florida East Coast Railway Co.*, 410 U.S. 224 (1972).

It is the intent of the Committee to overrule legislatively *Federal Maritime Commission* v. *Svenska Amerika Linien,* 390 U.S. 238 (1968). Neither the burden of proof nor the burden of persuasion shall be shifted solely on the grounds that the agreement would, absent approval, violate the antitrust laws or have significant anticompetitive effects. The burden of proof shall remain throughout the proceedings on the opponents of an agreement.

Overruling *Svenska* is fundamental to the intent of this bill. The Committee believes that vague standards such as the "public interest" or "detriment to the commerce" tests must be eliminated in order to bring predictability to what has been an unruly regulatory process (in its own right against the public interest and detrimental to the commerce). The entire fabric of this bill promotes these interests by encouraging commercial balance between carriers, shippers, and others, and by prescribing stiff sanctions for specifically prohibited noxious activities. The Committee wishes to provide no opportunity for the reinfusion of antitrust principles into the agreement review process. The competitive impact of an agreement upon parties to it is not a concern and other effects are a concern only to the extent an objector carries its burden of proof that a specific prohibition has been violated.

If the Commission finds that willful delays of a party have made it impossible for the Commission to conclude any proceeding within 180 days, then the Commission may cancel the agreement or dismiss the proceeding solely on the basis of the delay ", or toll the 180-day decision time for the period of any delay attributable to the proponent." Failure of an agreement's proponent to comply with lawfully issued subpenas or discovery orders in a proceeding is also grounds for cancellation.

The Commission shall not limit the effectiveness of an agreement to a fixed term. At present, some agreements are limited by the Commission to a fixed period of time. In such cases, members of an agreement on the basis of actual experience during the term of approval. It is possible for an agreement to lapse pending a hearing regarding its extension. The Committee believes that members of an agreement should be able to make business decisions with the knowledge that their agreement will contiunue for an unlimited term, absent actual findings conduct which violates section 12. The increased emphasis placed on Commission surveillance of operating agreements should ensure that appropriate action can be taken if changing trade conditions cause an agreement to operate in violation of the bill.

In summary, this section expedites and simplifies the agreement implementation process. Agreements may be modified or cancelled only if they violate specific prohibited acts. They are not to be judged by broad public interest standards or the policy objectives of this bill.

Section 7.—Loyalty contracts

This section allows any conference or ocean common carrier engaged in foreign commerce to utilize loyalty contracts. These are contracts in which shippers agree to use the services to the members of a conference, and in return for such patronage, the shipper receives services at rates below those who do not sign such contracts. Shippers and carriers each have the right to seek loyalty arrangements tailored to commodity and geographic needs and capabilities. This section is modeled on the "dual rate contract" authority of section 14b of the 1916 Act, though, unlike section 14b, this section does not require approval by the Commission prior to use of a loyalty contract. The thrust of section 7 is that so long as a loyalty contract meets the specific requirements it is lawful and may be

used, although filing of sample loyalty contracts is required by section 9. Loyalty contracts are exempted from the antitrust laws by section 8.

While the language of section 7 generally tracks that of section 14b of the Shipping Act, 1916, there are several significant changes.

Section 7(a) specifically authorizes the use of loyalty contracts for through transportation service. Where the contract is effective for through transportation movements, however, the carrier or conference must also provide the contract shipper with the option of contract service for shipments received at the port (that is, for just the ocean portion of the movement). Use of contract service either for the through movement or from the port will satisfy the contract shipper's obligation.

Section 7(a)(2) waives the shipper's loyalty obligation when the carrier cannot provide sufficient space of the type that is suited to the shippers' purpose; it is intended to recognize, for example, the difference between LASH, break-bulk, and container space.

Section 7(a)(3) modifies the requirement that contract rates may be increased only on 90 days notice in two ways. A shipper may agree to less notice, or, if the rate has been reduced within 180 days, an increase may be imposed on 30 days notice if it does not exceed the pre-reduction level.

Section 7(a)(4) places a modest burden of proof on the contract shipper when a dispute arises concerning whether the shipper divested his legal right to select a carrier with the sole intent of avoiding his loyalty contract obligations.

Under section 7(a)(5) the contract shipper has the right to use competing services of ports outside the geographic range served by the conference without being in breach.

Section 7(a)(6) sets forth the proper measure of damages.

Section 7(a)(7) permits the shipper, carrier, or conference to terminate the loyalty contract without penalty on 90 days notice.

The right of a shipper, carrier, or conference to terminate a loyalty contract, in whole or with respect to any commodity, is intended to recognize the everchanging nature of U.S. participation in foreign commerce.

To realize the maximum benefits of these contractual arrangements and to enhance U.S. participation in foreign commerce by providing this needed flexibility to meet changing market needs, the Committee fully expects that shippers, carriers, and conferences will monitor these contractual arrangements and, when in their mutual economic self-interest, seek modification of them so that U.S. needs in foreign commerce continue to be met. The Committee does not intend that these contracts be used solely for the advantage of only one party. The Committee strongly urges shippers, carriers, and conferences to be sensitive to the others' market needs and requirements and cooperatively seek to solve common problems.

Section 7(a)(8) allows greater flexibility by authorizing more than one level of discount between ordinary rates and the contract rates. A carrier could, for example, offer a discount rate for contracts where the export shipper is a signatory and a larger discount

where both the export shipper and the consignee are contract signatories.

Section 7(a)(9) exempts not only bulk cargo, "except liquid bulk, other than chemicals, in less than full shipload lots," but also forest products in an unfinished or semifinished state.

The use of a loyalty contract that does not conform to the requirements of section 7 is a violation exclusively of this bill.

Section 8.—Exemption from antitrust laws

Section 8 extends antitrust immunity to agreements of ocean common carriers, to agreements of marine terminal operators, to shippers' councils, to loyalty contracts, and to other activities regulated under provisions of the bill.

Subsection (a) defines the scope of the full antitrust immunity conferred by the bill. That immunity extends under paragraph (a) to any agreement that has become effective under section 5, or is exempt from any requirement of the act pursuant to section 16.

Subsection (b) provides the same immunity for any conduct that is undertaken in the reasonable belief that it is pursuant to an effective agreement or that it is exempt from any filing requirement pursuant to section 16.

The intent of these provisions is to confer antitrust immunity on agreements and conduct properly submitted to the regulatory process of the act. Subsection (a) confers no immunity on secret or covert conduct, on agreements that are not filed and in effect, and on conduct that is not undertaken in the reasonable belief that it is pursuant to an agreement. The Committee intends that the "reasonable belief" test allow a person latitude for good faith errors of judgment, particularly in situations in which the dividing line between prohibited and authorized conduct under the Shipping Act cannot be drawn with precision. At the same time, the "reasonable belief" test, though resting on the subjective intent of the actor, is limited by the objective test that the actor's belief be a "reasonable" one. It is the intent however to resolve conflicts between the Shipping Act and the antitrust laws in the maritime sector in favor of Shipping Act jurisdiction.

Once the requirements of sections 5 and 6 have been met, activities pursuant to such agreements or reasonably believed to be pursuant to such agreements, are subject solely to the Shipping Act. Only the standards, remedies and penalties of this legislation will apply. Carriers operating in the U.S. foreign commerce will no longer face a dual risk of being regulated under both the Shipping Act and the antitrust laws for their conference activities. This is intended to be a broad exemption from the antitrust laws for the activities outlined therein.

Section 8(b)(1) explicitly states that the antitrust immunity granted by this bill does not extend to air, rail, motor, or water carriers not regulated by it. This act does not extend antitrust immunity to any agreement among tanker or bulk cargo vessel owners or operators including those carrying chemical parcels in less than full shipload lots. Immunity is not extended to any discussion between combinations of members of an ocean conference and inland carriers concerning the inland divisions of through rates.

The principal purpose of subsection (b) is to make clear that the bill does not confer antitrust immunity for agreements between an ocean common carrier and groups of inland carriers, or among inland carriers alone, concerning intermodal movements. Obviously, it is necessary that an individual ocean common carrier be able to enter into an agreement with an individual inland common carrier regarding through transportation, and such one-on-one arrangements should, and are intended to be, exempt from the antitrust laws as an activity authorized by section 4(a)(1) of the bill.

Section 8(b)(2) introduces the terms "inland divisions" and "inland portion." Antitrust immunity is not extended to ocean carriers to agree on inland divisions, that is, the ocean carrier's inland costs which are the amounts they pay U.S. surface carriers. Conferences of ocean carriers could not therefore negotiate rates with U.S. inland carriers; this must be undertaken by individual ocean carriers. The ocean carriers do have antitrust immunity, however, to discuss and agree on the inland portion of through rates and the overall through rate itself, that is, the amounts charged to shippers which are the ocean carriers' revenues from the inland services.

It is also a purpose of subsection (b) to withhold antitrust immunity from common carriers that are subject to the bill only with respect to joint discussion or agreement concerning the fixing of the inland divisions of through rates. The word "fixing" is carefully chosen to leave room for general discussions regarding the arrangements with inland carriers that each individual ocean carrier has separately negotiated. Obviously, once the inland division of a through rate has been established between an individual ocean common carrier, a conference of which the latter is a member must be able to take into account the various inland divisions in collectively setting the conference through rate (an activity expressly authorized by section 4(a)(1) of this bill).

Section 9.—Tariffs

This section, based on section 18(b) of the 1916 Act, requires that all "common carriers" including both vessel operators and nonvessel operators, and every conference must publish and file their tariffs with the Commission for port-to-port ocean transportation service and for through transportation service, including intermodal movements of cargo. With regard to intermodal transportation service, the common carrier subject to this bill shall not reveal in its tariff the inland rate divisions of a joint through rate. This prohibition preserves recently enacted deregulatory changes enacted recently affecting inland modes of transportation within the United States. In addition to bulk cargo, forest products in an unfinished or semifinished state are commodities that are exempted from the tariff filing requirements of this section. Further, nothing in this section or this bill is intended to change current government rules and practices for the carriage of government cargoes, and rates for such transportation are not subject to regulation by any conference or other concerted activity except to the extent permitted by the United States Government.

This section generally continues the requirements of section 18(b) of the 1916 Act regarding the material that a carrier must include in its tariffs.

Specific statutory authority for the use of time/volume rates is provided under this section, as well as specific authority for vessel-operating common carriers to enter into service contracts with individual shippers. Time/volume rates must appear in a carriers tariff. They may also be offered in conjunction with a service contract but need not be so connected.

While service contracts between shippers and carriers have not been unknown in the U.S. foreign commerce, there has not previously been specific statutory authority for such contracts. A "service contract" is, by definition, an undertaking between a shipper and a carrier or conference that involves consideration and obligations different than those applicable when business is transacted under a general common carrier tariff, or under a loyalty contract, or simple time-volume rate arrangement To aid the Commission in enforcing the requirements of this bill, section 9(c) requires that the entire contract must be filed with the Commission, though that document shall remain confidential. For public information, however, all "essential terms," as specifically enumerated, shall be published and filed in tariffs to ensure that such essential terms shall be available to all shippers similarly situated. This objective is consistent with the rationale for tariff publication and, accordingly, the essential terms must be stated with sufficient specificity to serve that purpose.

Reference is made in paragraph (1) to disclosure of "port ranges" for port-to-port movements, and of "geographic areas" for through intermodal movements. Service contracts may—and in many if not most cases—cover port-to-point or point-to-port movements. In such cases, it is intended that the appropriate term applicable to the respective origin or destination of contract shipments shall govern the necessary disclosure with respect to such movements.

The term "port range" is intended to encompass those ports in the country of loading or unloading of the contract cargo that are regularly served by the contracting carrier or conference, as specified in the tariff applicable to the service in which the contract is to be employed, even if the contract itself contemplates use of but a single port within that range.

The term "geographic area" is intended to identify the general location from which or to which the contract cargo would be moving in intermodal service. Obviously, the scope of this term will necessarily vary from country to country, depending on its size. For Iceland, for example, identifying the country itself may suffice. However, with larger countries, reference to a particular geographic subdivision will usually be necessary in order to satisfy the requirement of commercially meaningful disclosure. Whether identification of a city, county, state (or their equivalent) or a broader geographic region within a given country will suffice for this purpose should, in the Committee's view, be left to a determination in the marketplace by the parties themselves, guided by the underlying legislative intent of the disclosure requirement. If that intent is not adequately implemented in a publication of this, or any other, "essential term" of a particular contract, an aggrieved party may always seek redress before the FMC under Section 13 of the bill.

The "line-haul rate," referred to in paragraph (4) includes all compensation to be paid and must also be disclosed. Many service

contracts may provide for charges or allowances for transporting and handling the goods involved that may be different from those published in the otherwise applicable general tariff and, accordingly, any such variance must be identified in the line-haul rate disclosure. To the extent any contract charge or allowance is the same as that in the carrier's or conference's general public tariff, incorporation by reference will suffice.

Paragraph (3) refers to the minimum volume of cargo to be shipped at the line-haul rate specified in paragraph (4). Read together, this means that if there are "staged" volumes and rates in the contract—for example, different rates applicable to different quantities of cargo—each minimum volume and each related line-haul rate is an essential term of the contract. Again, the legislative intent is to provide meaningful commercial disclosure so that interested parties can have access to the facts necessary for intelligent evaluation of the competitive significance of a service contract.

Paragraph (6) requires disclosure of the service commitments in a contract. This goes to the very essence of a service contract, embodying undertakings and obligations above and beyond those involved when business is transacted under the otherwise applicable general common carrier tariff. It should be emphasizd that a loyalty contract or a time-volume rate arrangement, each separately authorized elsewhere in the bill, are not service contracts with the intended meaning of that term unless accompanied by a bona fide special service commitment by the contracting carrier or conference that deviates from its general tariff obligation.

In summary, the disclosure reflected in each specified "essential term" of a "service contract" must be at least the minimum necessary, when read in context with each other, to inform other shippers of rates and services available to them. Reference to "essential terms" is not intended to incorporate the present or future scope of that term as used in the Staggers Rail Act and no other terms in the contract than those enumerated in section 9(c) need be made public. The parties are of course free to publish additional or more informative details or, indeed, the entire contract if they wish to do so. Nor does the list of "essential terms" imply that a contract must contain each such term to be considered a service contract; it merely means that, to the extent that such terms are included in the contract, they must be made public.

An explanation is warranted regarding the interrelation of the independent action provision set out in section 5(d) and the services contract authority set out in section 9(c). Section 5(d) requires that any conference utilizing any loyalty contract in its trade must permit any member of the conference to take independent action on any rate or service item required to be filed in a tariff under section 9 when certain conditions are met. This includes all the "rates, charges, classifications, rules, and practices between all points or ports on (the conference's) own route and on any through transportation route that has been established" under section 9(c). Service items not required to be filed in tariffs are not reachable by the independent action granted in section 5(d). Thus, though section 9(c) does not in and of itself represent a distinct grant of the right of independent action apart from section 5(d), it should be clearly understood that a conference utilizing a loyalty contract

may not deny its members the right of independent action with respect to any service contract item required to be filed in a tariff under section 9. A conference that does not utilize a loyalty contract, however, may preclude its members from entering service contracts individually or may prescribe criteria and conference review as prerequisites for such individual activity, consistent with other requirements of the bill. Naturally, any nonconference carrier may enter service contracts. When a shipper has signed both a conference loyalty contract and a service contract with that conference or one of its members, the service contract would take precedence in the event of a conflict in terms. Nothing in section 9(c) alters the ocean common carrier's obligations not to unjustly discriminate among shippers in offering and providing services.

The notice requirements for the filing of new, increased or decreased rates and the special permission authority of the Commission are the same as that contained in section 18(b) of the Shipping Act, 1916. The refund or waiver provision of section 18(b)(3) of the 1916 Act is also continued with a single exception—refund or waiver applications may be made by shippers as well as carriers.

Section 10.—Controlled carriers

Section 10 carries forward without substantive change the provisions of section 18(c) of the Shipping Act, 1916 (Public Law 95-483).

Section 11.—Ocean freight forwarders

This section replaces section 44 of the 1916 Act and requires ocean freight forwarders to be licensed and bonded by the Commission. An exception is permitted to any person whose primary business is the sale of merchandise and who is involved in the shipment of such merchandise for his own account. The requirement that one be qualified by experience and character to render forwarding services is a modification of the existing standard and is meant to be liberal so as not to pose an unreasonable restraint on entry to the business. The bill effects no change in the procedures for considering license applications or alleged violations. Revocation of a license for failure to maintain an adequate bond would not require a hearing.

No compensation shall be paid to or received by any person until there is written certification by that person to the ocean common carrier that such person is licensed by the Commission and has performed the statutorily-required services. Ocean common carriers are prohibited from paying for these services more than once on the same shipment.

This section also permanently adopts the temporary amendments enacted in section 1608 of the Omnibus Budget Reconciliation Act of 1981 (Public Law 97-35) to eliminate the "no beneficial interest rule" that has prevailed since 1961. Ocean freight forwarders no longer would be prohibited from being affiliated or connected with a shipper, consignee, or any other person having a beneficial interest in any shipments to foreign countries; however, the forwarder could not receive compensation from a carrier with respect to any shipment in which the forwarder does have a direct or indirect beneficial interest.

The concerns that led to the original insertion of the prohibition in the Shipping Act are satisfied by the restriction on a forwarder receiving compensation from a carrier with respect to a shipment in which it or any related company has a beneficial interest. This restriction effectively prevents the "dummy forwarder" scheme in which a forwarder is established by a shipper for the purpose of passing through rebates from carriers. At the same time, this provision permits freight forwarders with international trade expertise to participate in export trading companies, as is allowed elsewhere in the world, in the event that Congress enacts the pending Export Trading Company bill (S. 144).

The present bill also repeals subsection (c) of section 1608 of the Budget Act. That subsection provides that the changes made to this area of freight forwarder law would terminate after December 31, 1983. The conference report accompanying the Budget Act stated that the inclusion of the sunset provision was not meant to imply that the changes would not be permanent, but rather was intended to allow for a test period during which the Commission could evaluate the impact of the changes on the industry. Experience to date under the Budget Act changes has not revealed any problems with the removal of the shipper connection prohibition. Retention of a sunset provision would only act to dissuade the type of forwarder-shipper arrangements that the section seeks to permit, because none would wish to rely on such tenuous authority.

The requirement that a forwarder certify that it has performed two out of five listed services as a prerequisite for receipt of compensation has been deleted.

Section 12.—Prohibited acts

This section draws together in one section most of the prohibited acts that were scattered throughout the 1916 Act. It also adds several new prohibited acts in lieu of the vague standards now used in approving agreements under section 15 of the 1916 Act.

Any violation of section 12 may be grounds for suspension, modification, or cancellation of an agreement under section 6. A violation also incurs a civil penalty under section 15. It may also be grounds for reparations to cover actual injury to private parties under section 13. Violation of the anti-rebating provisions provides grounds in addition for tariff suspension under section 15.

The Committee strongly believes that the list of acts prohibited by section 12 with the other requirements of this bill will be sufficient to restrain abuses of concerted power and to protect shippers, ports, nonconference carriers, and others. Specifically prohibited acts should better inform those acting under the authority of this bill of the limits on their activity and the obligations expected of them. Certain types of conduct previously held to be procluded under the "public interest" or "detriment to the commerce" standards of section 15 of the 1916 Act have been specifically prohibited in section 12; this is the case with subsection (b)(7) and (c)(1)(3) and (6). In addition, the unjust discrimination language of subsection (b) has been expanded from its antecedent, section 14 fourth of the 1916 Act, to include some additional protection previously provided by the unjust discrimination standard of section 15 of the 1916 Act. The Committee believes firmly that the unjust discrimination pro-

hibition of subsection (b) and the predatory practices prohibition of subsection (c)(4) sufficiently cover the gamut of noxious practices that are of greatest concern. The Committee, however, hopes they will not be read so broadly that they provide a basis for fishing expeditions or harassment that defeat other objectives of the bill.

Section 12(a) (1) and (2) mandates that no conference, ocean common carrier, shippers' council, shipper, or other person subject to this bill may operate under agreements that have not taken effect or have been rejected, suspended or disapproved.

Section 12(a)(3) prohibits shippers, shippers' councils, ocean freight forwarders and nonvessel-operating common carriers from obtaining or attempting to obtain transportation at rates that are below those in the tariffs on file.

Section 12(b) (1), (2), and (3) derive from section 18(b)(3) of the 1916 Act.

Section 12(b)(4) derives from section 16 Second of the 1916 Act.

Section 12(b)(5) derives from section 14 Third of the 1916 Act.

Section 12(b)(6) substantially revises the provisions of section 14 Fourth. It also carries forward to a limited extent the existing prohibition of section 15 against unfair or unjustly discriminatory agreements. Section 12(b)(6) prohibits common carriers from engaging in "any unfair or unjustly discriminatory practices" against any shipper or port in the matter of (A) rates or charges, (B) cargo classifications, (C) cargo space accommodations or other facilities, due regard being had for the proper loading of the vessel and the available tonnage, (D) the loading and landing of freight in proper condition; or (E) the adjustment and settlement of claims. This is considerably broader than section 14 Fourth of the 1916 Act.

Because section 12(b)(6) protects shippers or ports only, it is not as broad as the unjustly discriminatory standard currently found in section 15 of the 1916 Act. For example, it is not aimed at preventing unjust discrimination among carriers within a conference. The Commission, in the past, has found that cargo revenue pools which unfairly allocate shares as between member lines are contrary to the unjustly discriminatory standard of section 15. For example, see *Nopal Line* v. *Moore-McCormack Lines, Inc.* 8 F.M.C. 213 (1964). Under the bill an agreement which provides for an unjustly discriminatory or unfair allocation of pool shares between member lines would not be unlawful. The term "exporter and importers," now contained in section 15 of the 1916 Act, is encompassed by the tern "shipper." Similarly, the term "shipper" is broad enough that section 12(b)(6) can reach discrimination between exporters from the United States and their foreign competitors.

The purpose of section 12(b)(6), is to codify the common carrier obligation to treat similarly situated shippers and ports alike. The uniformity of treatment contemplated in this Bill is a relative equality based upon transportation conditions only. It is not intended to prohibit carriers from treating shippers or ports differently when the transportation circumstances surrounding the service are not substantially similar. Nor is it intended that the Commission have the authority to order a carrier or conference to provide service to any point, port, or place. It is basic that dissimilarity of circumstances and transportation conditions may warrant dissimilarity in rates or charges, services, regulation, and practice. This sec-

tion is not intended, alone or in conjunction with any other act, to equalize opportunity between shippers or ports, but rather to prohibit actions which are shown to be not justified by all relevant transportation conditions. Carriers and shippers should not be required by this subsection to engage in outdated and economically unsound practices; and rates, charges, and services should not be found to be unjustly discriminatory because they result in changes in transportation patterns.

Section 12(b)(7) carries forward present law.

Section 12(b)(8), prohibiting the use of deferred rebates, derives from section 14 First of the 1916 Act.

Section 12(c)(1) of the bill would prohibit any unreasonable concerted refusals to deal. An example of a concerted refusal to deal is found in Agreement No. 10294 No. 77-23 (F.M.C. Initial Decision served Dec. 13, 1979). Article 2 of Agreement No. 10294 prohibited any party to the agreement from paying consolidation allowances for shipments consolidated or deconsolidated at places other than deepsea waterfront facilities, notwithstanding anything to the contrary in any tariff or agreement in force. The Administrative Law Judge found that Agreement No. 10294 was a type of group boycott aimed at one segment of the consolidation industry. He concluded that it was disapprovable under the unjustly discriminatory standard of section 15 of the Shipping Act, 1916. Agreement No. 10294 was withdrawn by the parties prior to a Commission decision on exception to the initial decision. It is intended that group boycotts or concerted refusals to deal which fell within the unjustly discriminatory standard of section 15 of the Shipping Act, 1916, be prohibited under section 12(c)(1) of the bill.

Section 12(c)(3) of the bill prohibits collective action that would stifle the development of transportation innovation which the section seeks to protect. The sort of restriction which the section seeks to prevent is illustrated in the following passage from the Commission's decision in *Japan/Korea Atlantic & Gulf Conference Intermodal Amendment* No. 79-74 (F.M.C., June 17, 1981) at 14 n. 24, 20 S.R.R. 1173, 1181:

> Article 1(b) of Agreement No. 3103-67 allows JKAG members to commence individual interior point services of a type not offered by the Conference only after providing JKAG 120 days advance notice of their decision, whereas section 18(b) of the Shipping Act, 1916 (46 U.S.C. 817(b)) and the Commission's tariff regulations (46 C.F.R. Part 536) allows public tariffs covering new services to become effective 30 days after filing. The Commission has held that any requirement for advance notice to a conference other than customary tariff filing is unreasonable because it hinders the development of intermodal innovations. *American West Africa Freight Conference (Agreement No. 7680-36),* 18 S.R.R. 339, 342 (1978). The present record includes no information supporting JKAG's assertion that advance notice of member line innovations is necessary to accomplish Agreement No. 3103-67's basic objective of ameliorating excess rate competition. The availability of 120 days advance notice is not necessary to permit the

JKAG member lines to freely and thoroughly discuss intermodal proposals with each other.

The section is not limited to restrictions in intermodalism. It would also reach restrictions on other transportation innovations. Reference to intermodalism is intended to be by way of example. The language of this subsection is broad enough to prevent conferences or other agreements among carriers from becoming vehicles for restricting the development of new progressive services.

Section 12(c)(4) expands the prohibition found in section 14 Second of the 1916 Act against the use of fighting ships (covered separately in such section (b)(7) to include any predatory practice intended to eliminate the participation of an independent in the trade. An example of the sort of predatory practice which the section seeks to prohibit may be found in "Rates on U.S. Government Cargoes" 11 F.M.C. 263 (167). There, a conference reduced its rates to a noncompensatory level until Sapphire, an independent carrier, left the trade. The conference then raised its rates to their former levels. The Commission concluded that this action violated section 15 of the Shipping Act, 1916, because it was detrimental to the commerce of the United States. Although the "detrimental to commerce" standard has been deleted from the bill, the predatory practices which the Commission condemned in "Rates on U.S. Government Cargo" remain unlawful under section 12(c)(4). Nevertheless, the Committee recognizes that conferences do not, and should not be required to, set rates in a vacuum; the Committee expects that conferences will consider and analyze the rates and services offered by independent carriers when setting conference rates. While a conference may compete with independent carriers, it may not intentionally drive them out of business using unjustly predatory practices.

Section 12(c)(5) parallels section 8(b)(1). Section 12(c)(5) expressly precludes two or more carriers (other than a joint venture) from negotiating with inland carriers on the inland divisions. Similarly, section 8(b)(1) withholds antitrust immunity for such activities.

Section 12(c)(6) prohibits carriers from agreeing do deny brokerage to ocean freight forwarders or to pay it in an amount less than 1¼ percent of freight charges on any given shipment. This provision removes some considerable confusion in the current rules. The Commission in *Agreements and Practices re Brokerage,* 3 U.S.M.C. 170 (1949) had held that a concerted denial of brokerage was "detrimental to the commerce" under section 15 and, in dictum, suggested that payment of less than 1¼ percent also might be. The Commission later reversed this decision (and *Pacific Coast European Conference Payment of Brokers,* 5 F.M.C. 225 (1957)) in *Freight Forwarder Investigation,* 6 F.M.C. 327 (1961), and concluded that brokerage led to abuses and should be prohibited altogether. Congess, however, concluded in enacting P.L. 87-254 that, contrary to the *Freight Forwarder Investigation* case, carriers should be permitted to pay brokerage to ocean freight forwarders. Though the Commission then attempted to reinstate its conclusions in *Agreements and Practices re Brokerage* and *PCEC Payment of Brokerage,* their order was vacated in *Anglo-Canadian Shipping Company, Ltd.* v. *F.M.C.,*

310 F.2d 606 (9th Cir., 1962). Section 12(c)(b) will remove the confusion that has persisted since passage of Public Law 87-254.

Section 12(c)(7) prohibits carriers, other than a joint venture operating by itself, to allocate shippers among themselves, or to prevent one another from soliciting cargo from any particular shipper. This prohibition will not be enforced when the allocation is a result of a service contract or the laws of the United States or the foreign nation in the U.S. trade.

Section 12(d) carriers forward certain prohibitions from sections 17, 16, and 20 of the 1916 Act.

Section 12(e)—Under section 14a of the 1916 Act, the Commission was empowered to investigate whether any non-U.S. citizen had committed any of the prohibited acts contained in section 14 of the 1916 Act (now generally covered by section 12), and was party to any combination or arrangement which excluded upon equal terms with other flag carriers, a U.S.-flag carrier from any trade between foreign ports. If the Commission so found it was to certify the facts of such malpractice to the Secretary of Treasury who was then directed to deny entry to the non-U.S. citizen party to the arrangement to U.S. ports.

Section 12(e) derives from section 14a of the 1916 Act, repealed by section 20 of the Shipping Act of 1983. Like section 14a it empowers the Commission to investigate arrangements which exclude U.S. carriers from foreign-to-foreign trades. Unlike section 14a, however, it is not necessary for the Commission to find, in addition, that a person has committed a prohibited act. Section 12(e) moreover will apply to any unfair actions taken by carriers or governments which exclude or unduly impair the access of U.S.-flag vessels to trades between foreign countries. Such actions would include not only closed conferences employing fighting ships or deferred rebates, but also any other unfair actions or carriers, or of foreign governments, which have the effect of excluding from or unduly impairing the access of U.S.-flag vessels to trade between foreign ports.

By revising the law to focus on access, the Committee has made the language consitent with efforts of the administration to protect U.S. economic interests vis-a-vis the recent maritime policy decisions of OECD maritime nations. Particularly, in discussions with OECD nations regarding the European Economic Community's accession to the UNCTAD Code, the United States delegations have insisted on protecting rights of access of U.S. carriers to trades where the Code will apply. "Access" is an important concept because the U.S. Government has sought to avoid the Balkanization of trade patterns into small guaranteed shares of cargo. The Committee believes that section 12(e) is consistent with these national objectives.

The use of the tariff suspension mechanism by the Commission as a sanction rather than the denial of entry by the Treasury Department contained in former section 14a is intended to simplify enforcement. As is the case with other tariff suspensions under the Shipping Act of 1983, the President of the United States would have override powers on its exercise. This ensures consistency of policy application in retaliatory situations. Although tariff suspension is a remedy which can be used only against liner operators,

section 12(e) is broad enough to permit retaliation against liner operators in U.S. trades for events occurring in foreign bulk trades.

Section 13.—Complaints

Section 13 generally carries forward the provisions in section 22 of the 1916 Act, pertaining to formal investigations. The period for filing of reparations remains at 2 years as in current law.

Subsection 13(d) concerns special investigations of conduct pursuant to pooling agreements. The subsection provides that any private person may file a complaint with the Federal Maritime Commission and thereby initiate an investigation under this subsection of conduct pursuant to an agreement to pool or apportion traffic or revenues or to enter into a joint venture with other common carriers operating in the same trade. The Commission may, after hearing, reject, modify or terminate any such agreement unless the agreement meets any one of three standards, namely, (a) it results in gains in efficiency or service that outweigh any substantial diminution of competition; or (b) it is required or permitted by an express provision of a government-to-government agreement; or (c) it is in furtherance of the foreign policy interests of the United States.

The only remedy under the act for conduct found to violate this provision shall be rejection, termination or modification of the agreement.

The bill provides that pools and joint ventures which are not able to withstand specified tests would have to be disbanded or modified. To ensure, however, that the efficiencies of these types of agreements are not lost to the American shipping public by reluctance of carriers to use them due to any misinterpretation of the intent of these provisions, several points should be made clear.

First, the hearings and the record available to Congress have not indicated that pools and joint ventures in existence today have created any of the types of problems which the bill would protect against. If anything, the record indicates that, in this vastly overtonnaged shipping market, the public needs as many efficiency creating devices as possible so that carriers can achieve cost savings which can be passed on to shippers and ultimately to consumers.

Second, joint ventures and pools would be prohibited only after opponents carry the burden of proof to show that they contravene the statutory standards. The threshold test of an impermissible joint venture or pool is whether that agreement has the effect of substantially reducing competition in a trade considered as a whole. There are many factors affecting competition in a trade which would have to be considered by the FMC and which could greatly limit the possibility that a joint venture or a pool would substantially reduce competition. For example, there may be other carriers which are not parties to such agreements which offer substantial service in a trade. It must also be recognized that in this overtonnaged world, there is always the possibility that underutilized ships deployed in one trade would be quickly shifted to another trade to take advantage of what would certainly be excellent marketing opportunities in any noncompetitive market. Thus, potential competition and the lack of barriers to entry is also a factor.

The effect of a joint venture or pool on price and service competition would also be considered. Joint ventures can result in more effective and efficient service being provided in a trade; service that might very well be withdrawn or otherwise not be offered outside of a joint venture context. In these cases, it must be recognized that the joint venture adds service to a trade.

Pooling and equal access agreements are frequently essential in relieving an impasse, potential or actual, in our international trades. Such conflicts with U.S. free trade policy can result from the laws, regulations, or merely practices of foreign governments or of foreign financial institutions, shippers or carriers. The practical effect is to limit U.S.-flag liner services into certain trades on unequal terms with the national-flag carriers, or to exclude U.S. carries entirely. Frequently, the existence of a restrictive practice can only be inferred from the practical inability of U.S.-flag carriers to attract particular cargo. In such situations, the FMC should move expeditiously to enforce section 19 of the Shipping Act, 1916, or new section 12(e) of this act.

Section 14.—Subpenas and discovery

Section 14 generally carries forward the provisions in section 27 of the 1916 Act, relating to discovery. However, the provisions of section 14 make clear that the Commission's rules on discovery may be applied in all investigations and adjudications under the bill and not simply in investigations involving violations of the bill.

Section 15.—Penalties

This section provides civil penalties not to exceed $5,000 for each violation of the bill unless the violation is willful and knowing, in which case the penalty may not exceed $25,000 for each violation. The amount of the penalty is to be determined by the Commission, with each continuing day of violation constituting a separate offense.

For any violation of the antirebating provisions of section 12, or for failure to supply information ordered to be produced or compelled by subpena under section 14, the Commission may, subject to Presidential disapproval, suspend the carrier's or conference's tariffs. Continued operation, by a carrier, under suspended tariffs makes the carrier subject to civil penalties not in excess of $50,000 per shipment. Where failure to produce documents is based on the defense that a foreign blocking statute prohibits its release, the Commission must immediately notify the Secretary of State, who, in turn, is required to consult with the government of the nation involved to assist the Commission in obtaining the information sought. Subsection (b) basically restates provisions of Public Law 96–25.

This section also provides for review of an order assessing a civil penalty, and provides the manner in which an assessment will be recovered where a person fails to pay a civil penalty. The Commission may compromise, modify, or remit civil penalties.

The section prohibits the use of any criminal conspiracy statute to penalize violations of this bill. In order to assess any penalty under this bill, a formal proceeding must be begun within 5 years from the date when the violation occurred.

Section 16.—Commission orders

Section 16 of the bill carries forward with no substantive change the provisions contained in sections 23, 25, 29, and 30, of the 1916 Act.

Orders of the Commission relating to any violation of this bill shall be made only after opportunity for hearing and upon complaint or on its own motion. The Commission may reverse, suspend, or modify any order and, upon application by any party to a proceeding, may grant a rehearing. The Commission, any injured parties, or the Attorney General may seek enforcement of nonreparation orders by any United States district court having jurisdiction of the parties.

In the case of violation of any order of the Commission for the payment of reparation, the person to whom such award was made may seek enforcement of such order in any United States district court having jurisdiction of the parties. A petitioner who prevails shall be allowed a reasonable attorney's fee. The order of the Commission shall be prima facie evidence of the facts stated therein.

Any action seeking enforcement of a Commission order must be filed within 1 year from the date of the order.

The Commission is given authority to represent itself in court. At present, the Commission is represented in court by the Antitrust Division of the Justice Department. The position of the Antitrust Division with regard to agreements is often antithetical to the position of the Commission. This section will eliminate the possibility of conflict, which currently may occur. This authority has been granted to other agencies (with or without qualification) such as CAB, CFTC, CPSC, FTC, ICC, ITC, NLRB, OSHA, and SEC.

Finally, the Commission is exempted from filing energy conservation impact statements.

Section 17.—Reports and certificates

Section 17 carries forward without substantive change the provisions of section 21 of the 1916 Act.

Section 18.—Exemptions

This section carries forward the provisions of section 35 of the 1916 Act. It empowers the Commission, prospectively, to exempt any specified activity or class of agreements from any requirements of this bill if the exemption will not substantially impair effective regulation. The section deletes the current requirement that the Commission find, before approving an exemption, that an agreement will not be unjustly discriminatory or detrimental to commerce.

This power is consistent with the objective of this bill to minimize Government intervention in and supervision of international liner shipping whenever not inconsistent with other goals of the bill. This power may also prove useful in the event of conflict of laws where a trading partner also regulates the trade regulated by this bill.

Section 19.—Regulations

This section authorizes the Commission to make such rules and regulations as may be necessary to carry out the provisions of this bill.

In drafting this legislation, the Committee took particular care to ensure a balance between the needs of shippers and carriers. This balance created a dual objective in the Committee's approach to reforming the Federal economic regulations governing the maritime liner industry—specifically, to ensure that U.S.-flag carriers improve their ability to compete against their foreign counterparts, and to ensure that U.S. shippers improve their ability to participate in foreign commerce. In maintaining this balanced approach to regulation, the Committee expects the Federal Maritime Commission to provide the clarity and certainty necessary for achieving effective and efficient reform benefitting both shippers and carriers.

Section 20.—Report to Congress.

Due to uncertainty surrounding the new regulatory scheme envisioned by S. 504, and rapidly changing legal regimes affecting ocean liner shipping around the world, shippers and carriers have identified a need for continuing oversight following enactment of this bill. Some have sought the creation of an independent study commission to determine:

—Options for deregulation
—Trading policies of the U.S. vis-a-vis our major trading partners
—The role of antitrust laws in international shipping
—The health of the U.S. liner fleet
—The role of the Federal Maritime Commission
—The structural, competitive and economic difference between ocean shipping and other, recently deregulated, transportation modes.

Section 21.—Repeals and conforming amendments

This section modifies the Shipping Act, 1916, so that it regulates only domestic offshore liner shipping. All agreements, contracts, modifications, and exemptions previously approved by the Commission continue in force and effect as if approved under the provisions of this bill and all new agreements, contracts, and all modifications to existing, pending, or new contracts or agreements shall be considered under the provisions of this bill.

Subsection 21(e) codifies an understanding between shippers and carriers that service contracts entered into prior to enactment of this bill would not be subject to the new service contract requirements for a specified period of time following enactment. Fifteen months represents a middle ground among the proposed periods. The Committee's intention in this, as well as other sections of the act, is to institute changes in liner shipping regulations and practices without undue or unnecessary economic disruption.

Paragraph 21(e)(2) precludes interference with suits filed prior to the date of introduction of S. 47.

Section 22.—Effective date

This section makes the bill effective 180 days after enactment, except that section 19, authorizing the Commission to promulgate regulations to effectuate the bill, takes effect upon enactment.

Rollcall Votes in Committee

In accordance with paragraph 7(c) of rule XXVI of the Standing Rules of the Senate, the Committee provides the following record votes during its consideration of S. 504.

Motion of Senator Gorton ot report the bill carried by a vote of 14 yeas and no nays.[1]

Yeas—14	Nays—0
Mr. Packwood	
Mr. Goldwater	
Mr. Danforth	
Mr. Gorton	
Mr. Stevens [1]	
Mr. Kasten [1]	
Mr. Trible	
Mr. Hollings [1]	
Mr. Long	
Mr. Inouye	
Mr. Ford	
Mr. Riegle	
Mr. Exon [1]	
Mr. Lautenberg	

Changes in Existing Law

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new material is printed in italic, existing law in which no change is proposed is shown in roman):

Shipping Act, 1916

SECTION 1 OF THAT ACT

That when used in this Act:

The term "common carrier by water in foreign commerce" means a common carrier, except ferryboats running on regular routes, engaged in the transportation by water of passengers or property between the United States or any of its Districts, Territories, or possessions and a foreign country, whether in the import or export trade: Provided, That a cargo boat commonly called an ocean tramp shall not be deemed such "common carrier by water in foreign commerce."

The term "common carrier by water in interstate commerce" means a common carrier engaged in the transportation by water of passengers or property on the high seas or the Great Lakes on regular routes from port to port between one

[1] By proxy.

State, Territory, District, or possession of the United States and any other State, Territory, District, or possession of the United States, or between places in the same Territory, District, or possession.

The term "common carrier by water" means a common carrier by water in foreign commerce or a common carrier by water in interstate commerce or the high seas or the Great Lakes on regular routes from port to port.

[The term "controlled carrier" means a common carrier by water operating, offering, or proposing to offer service in the foreign commerce of the United States which carrier is or whose operating assets are directly or indirectly owned or controlled by the government under whose registry the vessels of the controlled carrier operate. Ownership or control by such government shall be deemed to exist if a majority portion of the interest in the carrier is owned or controlled in any manner by such government, by any agency of the government, or by any person, corporation, or entity controlled by such government. Ownership or control shall also be deemed to exist if the government has the right to appoint or disapprove the appointment of a majority of the directors or the chief operating or executive officer of the carrier.]

The term "other person subject to this Act" means any person not included in the term "common carrier by water," carrying on the business of forwarding or furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier by water.

The term "person" includes corporations, partnerships, and associations, existing under or authorized by the laws of the United States, or any State, Territory, District, or possession thereof, or of any foreign country.

The term "vessel" includes all water craft and other artificial contrivances of whatever description and at whatever stage of construction, whether on the stocks or launched, which are used or are capable of being or are intended to be used as a means of transportation on water.

The term "documented under the laws of the United States," means "registered, enrolled, or licensed under the laws of the United States."

The term "carrying on the business of forwarding" means the dispatching of shipments by any person on behalf of others, by oceangoing common carriers in commerce from the United States, its Territories, or possessions to foreign countries, or between the United States and its Territories or possessions, or between such Territories and possessions, and handling the formalities incident to such shipments.

The term "independent ocean freight forwarder" means a person that is carrying on the business of forwarding for a consideration who is not a shipper, consignee, seller, or purchaser of shipments to foreign countries.

The term "maritime labor agreement" means any collective bargaining agreement between an employer subject to this Act, or group of such employers and a labor organization representing employees in the maritime or stevedoring industry, or any

agreement preparatory to such a collective bargaining agreement among members of a multiemployer bargaining group, or any agreement specifically implementing provisions of such a collective bargaining agreement or providing for the formation, financing, or administration of a multiemployer bargaining group.

SECTION 13 OF THAT ACT

[SEC. 13. That for the purpose of carrying out the provisions of sections five and eleven no liability shall be incurred exceeding a total of $50,000,000 and the Secretary of the Treasury, upon the request of the board, approved by the President, shall from time to time issue and sell or use any of the bonds of the United States now available in the Treasury under the acts of August fifth, nineteen hundred and nine, February fourth, nineteen hundred and ten, and March second, nineteen hundred and eleven, relating to the issue of bonds for the construction of the Panama Canal, to a total amount not to exceed $50,000,000: *Provided,* That any bonds issued and sold or used under the provisions of this section may be made payable at such time within fifty years after issue as the Secretary of the Treasury may fix, instead of fifty years after the date of issue, as prescribed in the act of August fifth, nineteen hundred and nine.

[The proceeds of such bonds and the net proceeds of all sales, charters, and leases of vessels and of sales of stock made by the board, and all other moneys received by it from any source, shall be covered into the Treasury to the credit of the board, and are hereby permanently appropriated for the purpose of carrying out the provisions of sections five and eleven.]

SECTION 14 OF THAT ACT

SEC. 14. That no common carrier by water *in interstate commerce* shall, directly or indirectly, in respect to the transportation by water of passengers or property between a port of a State, Territory, District, or possession of the United States and any other such port [or a port of a foreign country]—

First. Pay, or allow, or enter into any combination, agreement, or understanding, express or implied, to pay or allow a deferred rebate to any shipper. The term "deferred rebate" in this Act means a return of any portion of the freight money by a carrier to any shipper as a consideration for the giving of all or any portion of his shipments to the same or any other carrier, or for any other purpose, the payment of which is deferred beyond the completion of the service for which it is paid, and is made only if, during both the period for which computed and the period of deferment, the shipper has complied with the terms of the rebate agreement or arrangement.

Second. Use a fighting ship either separately or in conjunction with any other carrier, through agreement or otherwise. The term "fighting ship" in this Act means a vessel used in a particular trade by a carrier or group of carriers for the purpose of excluding, preventing, or reducing competition by driving another carrier out of said trade.

Third. Retaliate against any shipper by refusing, or threatening to refuse, space accommodations when such are available, or resort to other discriminating or unfair methods, because such shipper has patronized any other carrier or has filed a complaint charging unfair treatment, or for any other reason.

Fourth. Make any unfair or unjustly discriminatory contract with any shipper based on the volume of freight offered, or unfairly treat or unjustly discriminate against any shipper in the matter of (a) cargo space accommodations or other facilities, due regard being had for the proper loading of the vessel and the available tonnage; (b) the loading and landing of freight in proper condition; or (c) the adjustment and settlement of claims.

Any carrier who violates any provision of this section shall be guilty of a misdemeanor punishable by a fine of not more than $25,000 for each offense [: *Provided,* That nothing in this section or elsewhere in this Act, shall be construed or applied to forbid or make unlawful any dual rate contract arrangement in use by the members of a conference on May 19, 1958, which conference is organized under an agreement approved under section 15 of this Act by the regulatory body administering this Act, unless and until such regulatory body disapproves, cancels, or modifies such arrangement in accordance with the standards set forth in section 15 of this Act. The term "dual rate contract arrangement" as used herein means a practice whereby a conference establishes tariffs of rates at two levels the lower of which will be charged to merchants who agree to ship their cargoes on vessels of members of the conference only and the higher of which shall be charged to merchants who do not so agree.].

SECTION 14a OF THAT ACT

[SEC. 14a. The Federal Maritime Commission on its own initiative may, or upon complaint shall after due notice to all parties in interest and hearing, determine whether any person, not a citizen of the United States and engaged in transportation by water of passengers or property—

(1) Has violated any provision of section 14, or

(2) Is a party to any combination, agreement, or understanding, express or implied, that involves in respect to transportation of passengers or property between foreign ports, deferred rebates or any other unfair practice designated in section 14, and that excludes from admission upon equal terms with all other parties thereto, a common carrier by water which is a citizen of the United States and which has applied for such admission.

If the Federal Maritime Commission determines that any such person has violated any such provision or is a party to any such combination, agreement, or understanding, the Federal Maritime Commission shall thereupon certify such fact to the Secretary of Transportation or the Secretary of the Treasury. The Secretary shall thereafter refuse such person the right of entry for any ship owned or operated by him or by any carrier directly or indirectly controlled by him, into any port of the United States, or any Territory, District, or possession thereof, until the Federal Maritime

Commission certifies that the violation has ceased or such combination, agreement, or understanding has been terminated.]

SECTION 14B OF THAT ACT

[SEC. 14b. Notwithstanding any other provisions of this Act, on application the Federal Maritime Commission (hereinafter "Commission"), shall, after notice, and hearing, by order, permit the use by any common carrier or conference of such carriers in foreign commerce of any contract, amendment, or modification thereof, which is available to all shippers and consignees on equal terms and conditions, which provides lower rates to a shipper or consignee who agrees to give all or any fixed portion of his patronage to such carrier or conference of carriers unless the Commission finds that the contract, amendment, or modification thereof will be detrimental to the commerce of the United States or contrary to the public interest, or unjustly discriminatory or unfair as between shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, and provided the contract, amendment, or modification thereof, expressly (1) permits prompt release of the contract shipper from the contract with respect to any shipment or shipments for which the contracting carrier or conference of carriers cannot provide as much space as the contract shipper shall require on reasonable notice; (2) provides that whenever a tariff rate for the carriage of goods under the contract becomes effective, insofar as it is under the control of the carrier or conference of carriers, it shall not be increased before a reasonable period, but in no case less than ninety days; (3) covers only those goods of the contract shipper as to the shipment of which he has the legal right at the time of shipment to select the carrier; *Provided, however,* That it shall be deemed a breach of the contract if, before the time of shipment and with the intent to avoid his obligation under the contract, the contract shipper divests himself, or with the same intent permits himself to be divested, of the legal right to select the carrier and the shipment is carried by a carrier which is not a party to the contract; (4) does not require the contract shipper to divert shipment of goods from natural routings not served by the carrier or conference of carriers where direct carriage is available; (5) limits damages recoverable for breach by either party to actual damages to be determined after breach in accordance with the principles of contract law: *Provided, however,* That the contract may specify that in the case of a breach by a contract shipper the damages may be an amount not exceeding the freight charges computed at the contract rate on the particular shipment, less the cost of handling; (6) permits the contract shipper to terminate at any time without penalty upon ninety days' notice; (7) provides for a spread between ordinary rates and rates charged contract shippers which the Commission finds to be reasonable in all the circumstances but which spread shall in no event be more than 15 per centum of the ordinary rates; (8) excludes cargo of the contract shippers which is loaded and carried in bulk without mark or count except liquid bulk cargoes, other than chemicals, in less than full shipload lots: *Provided, however,* That upon finding that economic factors so warrant, the Commission may exclude from the

contract any commodity subject to the foregoing exception; and (9) contains such other provisions not inconsistent herewith as the Commission shall require or permit. The Commision shall withdraw permission which it has granted under the authority contained in this section for the use of any contract if it finds, after notice and hearing, that the use of such contract is detrimental to the commerce of the United States or contrary to the public interest, or is unjustly discriminatory or unfair as between shippers, exporters, importers, or ports, between exporters from the United States and their foreign competitors. The carrier or conference of carriers may on ninety days' notice terminate without penalty the contract rate system herein authorized, in whole or with respect to any commodity; *Provided, however*, That after such termination the carrier or conference of carriers may not reinstitute such contract rate system or part thereof so terminated without prior permission by the Commission in accordance with the provisions of this section. Any contract, amendment, or modification of any contract not permitted by the Commission shall be unlawful, and contracts, amendments, and modifications shall be lawful only when and as long as permitted by the Commission; before permission is granted or after permission is withdrawn it shall be unlawful to carry out in whole or in part, directly or indirectly, any such contract, amendment, or modification. As used in this section, the term "contract shipper" means a person other than a carrier or conference of carriers who is a party to a contract the use of which may be permitted under this section.]

SECTION 15 OF THAT ACT

SEC. 15. Every common carrier by water *in interstate commerce*, or other person subject to this Act, shall file immediately with the Commission a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this Act, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term "agreement" in this section includes understandings, conferences, and other arrangements, but does not include maritime labor agreements or any provisions of such agreements, unless such provisions provide for an assessment agreement described in the fifth paragraph of this section.

The Commission shall by order, after notice and hearing, disapprove, cancel or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to

the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of this Act, and shall approve all other agreements, modifications, or cancellations. No such agreement shall be approved, nor shall continued approval be permitted for any agreement (1) between carriers not members of the same conference or conferences of carriers serving different trades that would otherwise be naturally competitive, unless in the case of agreements between carriers, each carrier, or in the case of agreements between conferences, each conference, retains the right of independent action, or (2) in respect to any conference agreement, which fails to provide reasonable and equal terms and conditions for admission and readmission to conference membership of other qualified carriers in the trade, or fails to provide that any member may withdraw from membership upon reasonable notice without penalty for such withdrawal.

The Commission shall disapprove any such agreement, after notice and hearing, on a finding of inadequate policing of the obligations under it, or of failure or refusal to adopt and maintain reasonable procedures for promptly and fairly sharing and considering shippers' requests and complaints.

Any agreement and any modification or cancellation of any agreement not approved, or disapproved, by the Commission shall be unlawful, and agreements, modifications, and cancellations shall be lawful only when and as long as approved by the Commission; before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation; except that tariff rates, fares, and charges, and classifications, rules and regulations explanatory thereof [(including changes in special rates and charges covered by section 14b of this Act which do not involve a change in the spread between such rates and charges and the rates and charges applicable to noncontract shippers)] agreed upon by approved conferences, and changes and amendments hereto, if otherwise in accordance with law, shall be permitted to take effect without prior approval upon compliance [with the publication and filing requirements of section 18(b) hereof and] with the provisions of any regulations the Commission may adopt.

Assessment agreements, whether part of a collective bargaining agreement or negotiated separately, to the extent they provide for the funding or collectively bargained fringe benefit obligations on other than a uniform man-hour basis, regardless of the cargo handled or type of vessel or equipment utilized, shall be deemed approved upon filing with the Commission. The Commission shall thereafter, upon complaint filed within 2 years of the date of filing of the agreement, disapprove, cancel, or modify any such agreement, or charge or assessment pursuant thereto, that it finds, after notice and hearing, to be unjustly discriminatory or unfair as between carriers, shippers, or ports, or to operate to the detriment of the commerce of the United States. The Commission shall issue its final decision in any such complaint proceeding with 1 year of the date of filing of the complaint. To the extent that any assessment or charge is found, in such a complaint proceeding, to be unjustly discriminatory or unfair as between carriers, shippers, or ports, the Commission shall remedy the unjust discrimination or unfairness

for the period of time between the filing of a complaint and the final decision by means of assessment adjustments. Such adjustments shall be implemented by prospective credits or debits to future assessments or charges, except in the case of a complainant who has ceased activities subject to the assessment or charge, in which case reparation may be awarded. To the extent that any provision of this paragraph conflicts with the language of section 22 or any other section of this Act, or of the Intercoastal Shipping Act, 1933, the provisions of this paragraph shall control in any matter involving assessment agreements described herein.

Every agreement, modification, or cancellation lawful under this section, [or permitted under section 14b,] shall be excepted from the provisions of the Act approved July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monoplies", and amendments and Acts supplementary thereto, and the provisions of sections 73 to 77, both inclusive, of the Act approved August 27, 1894, entitled "An Act to reduce taxation, to provide revenue for the Government, and for other purposes", and amendments and Acts supplementary thereto.

Whoever violates any provision of this section [or of section 14b] shall be subject to a civil penalty of not more than $1,000 for each day such violation continues: Provided, however, That the penalty provisions of this section shall not apply to leases, licenses, assignments, or other agreements of similar character for the use of terminal property or facilities which were entered into before the date of enactment of this Act, and, if continued in effect beyond said date, submitted to the Federal Maritime Commission for approval prior to or within ninety days after the enactment of this Act, unless such leases, licenses, assignments, or other agreements for the use of terminal facilities are disapproved, modified, or canceled by the Commission and are continued in operation without regard to the Commission's action thereon. The Commission shall promptly approve, disapprove, cancel, or modify each such agreement in accordance with the provisions of this section.

SECTION 16 OF THAT ACT

SEC. 16. That it shall be unlawful for any shipper, consignor, consignee, forwarder, broker or other person, or any officer, agent, or employee thereof, knowingly and willfully, directly or indirectly, by means of false billing, false classification, false weighing, false report of weight, or by any other unjust or unfair device or means to obtain or attempt to obtain transportation by water for property at less than the rates or charges which would otherwise be applicable.

That it shall be unlawful for any common carrier by water *in interstate commerce* or other person subject to this Act, either alone or in conjunction with any other person, directly or indirectly:

First. To make or give any undue or unreasonable preference or advantage to any particular person, locality, or description or traffic in any respect whatsoever, or to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsover [: *Provided,* That within thirty days after enactment of this Act, or within thirty

days after the effective date or the filing with the Commission, whichever is later, of any conference freight rate, rule, or regulation in the foreign commerce of the United States, the Governor of any State, Commonwealth, or possession of the United States may file a protest with the Commission upon the ground that the rate, rule, or regulation unjustly discriminates against that State, Commonwealth, or possession of the United States, in which case the Commission shall issue an order to the conference to show cause why the rate, rule, or regulation should not be set aside. Within one hundred and eighty days from the date of the issuance of such order, the Commission shall determine whether or not such rate, rule, or regulation is unjustly discriminatory and issue a final order either dismissing the protest, or setting aside the rate, rule, or regulation.].

Second. To allow any person to obtain transportation for property at less than the regular rates or charges then established and enforced on the line of such carrier by means of false billing, false classification, false weighing, false report of weight, or by any other unjust or unfair device or means.

Third. To induce, persuade, or otherwise influence any marine insurance company or underwriter, or agent thereof, not to give a competing carrier by water as favorable a rate of insurance on vessel or cargo, having due regard to the class of vessel or cargo, as is granted to such carrier or other person subject to this Act.

Whoever violates any provision of this section other than paragraphs First and Third hereof shall be subject to a civil penalty of not more than $25,000 for each such violation.

Whoever violates paragraphs First and Third hereof shall be guilty of a misdemeanor punishable by a fine of not more than $5,000 for each offense.

SECTION 17 OF SUCH ACT

SEC. 17. [That no common carrier by water in foreign commerce shall demand, charge, or collect any rate, fare, or charge which is unjustly discriminatory between shippers or ports, or unjustly prejudicial to exporters of the United States as compared with their foreign competitors. Whenever the board finds that any such rate, fare, or charge is demanded, charged, or collected it may alter the same to the extend necessary to correct such unjust discrimination or prejudice and make an order that the carrier shall discontinue demanding, charging, or collecting any such unjustly discriminatory or prejudicial rate, fare, or charge.]

Every [such carrier and every] other person subject to this act shall establish, observe, and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storing, or delivering of property. Whenever the board finds that any such regulation or practice is unjust or unreasonable it may determine, prescribe, and order enforced a just and reasonable regulation or practice.

SECTION 18 OF THAT ACT

SEC. 18(a) * * *

[(b)(1) From and after ninety days following enactment hereof every common carrier by water in foreign commerce and every conference of such carriers shall file with the Commission and keep open to public inspection tariffs showing all the rates and charges of such carrier or conference of carriers for transportation to and from United States ports and foreign ports between all points on its own route and on any through route which has been established. Such tariffs shall plainly show the places between which freight will be carried, and shall contain the classification of freight in force, and shall also state separately such terminal or other charge, privilege, or facility under the control of the carrier or conference of carriers which is granted or allowed, and any rules or regulations which in anywise change, affect, or determine any part or the aggregate of such aforesaid rates, or charges, and shall include specimens of any bill of lading, contract of affreightment, or other document evidencing the transportation agreement. Copies of such tariffs shall be made available to any person and a reasonable charge may be made therefor. The requirements of this section shall not be applicable to cargo loaded and carried in bulk without mark or count, or to cargo which is softwood lumber. As used in this paragraph, the term "softwood lumber" means softwood lumber not further manufactured than passing lengthwise through a standard planing machine and crosscut to length, logs, poles, piling, and ties, including such articles preservatively treated, or bored, or framed, but not including plywood or finished articles knocked down or set up.

[(2) No change shall be made in rates, charges, classifications, rules or regulations, which results in an increase in cost to the shipper, nor shall any new or initial rate of any common carrier by water in foreign commerce or conference of such carriers be instituted, except by the publication, and filing, as aforesaid, of a new tariff or tariffs which shall become effective not earlier than thirty days after the date of publication and filing thereof with the Commission, and each such tariff or tariffs shall plainly show the changes proposed to be made in the tariff or tariffs then in force and the time when the rates, charges, classifications, rules or regulations as changed are to become effective: *Provided, however,* That the Commission may, in its discretion and for good cause, allow such changes and such new or initial rates to become effective upon less than the period of thirty days herein specified. Any changes in the rates, charges, or classifications, rules or regulations which results in a decreased cost to the shipper may become effective upon the publication and filing with the Commission. The term "tariff" as used in this paragraph shall include any amendment, supplement or reissue.

[(3) No common carrier by water in foreign commerce or conference of such carriers shall charge or demand or collect or receive a greater or less or different compensation for the transportation of property or for any service in connection therewith than the rates and charges which are specified in its tariffs on file with the Commission and duly published and in effect at the time; nor shall any such carrier rebate, refund, or remit in any manner or by any device any portion of the rates or charges so specified, nor extend or deny to any person any privilege or facility, except in accord-

ance with such tariffs: *Provided, however,* That the Federal Maritime Commission may in its discretion and for good cause shown permit a common carrier by water in foreign commerce or conference of such carriers to refund a portion of freight charges collected from a shipper or waive the collection of a portion of the charges from a shipper where it appears that there is an error in a tariff of a clerical or administrative nature or an error due to inadvertence in failing to file a new tariff and that such a refund or waiver will not result in discrimination among shippers: *Provided further,* That the common carrier by water in foreign commerce or conference of such carriers has prior to applying for authority to make refund, filed a new tariff with the Federal Maritime Commission which sets forth the rate on which such refund or waiver would be based: *Provided further,* That the carrier or conference agrees that if permission is granted by the Federal Maritime Commission, an appropriate notice will be published in the tariff, or such other steps taken as the Federal Maritime Commission may require, which give notice of the rate on which such refund or waiver would be based, and additional refunds or waivers as appropriate shall be made with respect to other shipments in the manner prescribed by the Commission in its order approving the application: *And provided further,* That application for refund or waiver must be filed with the Commission within one hundred and eighty days from the date of shipment.

[(4) The Commission shall by regulations prescribe the form and manner in which the tariffs required by this section shall be published and filed; and the Commission is authorized to reject any tariff filed with it which is not in conformity with this section and with such regulations. Upon rejection by the Commission, a tariff shall be void and its use unlawful.

[(5) The Commission shall disapprove any rate or charge filed by a common carrier by water in the foreign commerce of the United States or conference of carriers which, after hearing, it finds to be so unreasonably high or low as to be detrimental to the commerce of the United States.

[(6) Whoever violates any provision of this section, other than subsection (b)(3) hereof involving rebates or refunds shall be subject to a civil penalty of not more than $5,000 for each day such violation continues.

[(7) Whoever violates subsection (b)(3) hereof by means of rebates or refunds, shall be subject to a civil penalty of not more than $25,000 for each shipment on which a rebate or refund was paid and to suspension by the Commission of any or all tariffs filed by or on behalf of such carrier, or supension of that carrier's right to utilize any or all tariffs of conferences of which that carrier may be a member, for a period not to exceed twelve months. Any carrier whose tariffs or rights of use thereof have been suspended pursuant to this paragraph and who accepts cargo for carriage during the suspension period which cargo otherwise would have been governed by the provisions of the suspended tariff(s) shall be subject to a civil penalty of not more than $50,000 for each shipment so accepted.

[(c)(1) No controlled carrier subject to this Act shall maintain rates or charges in its tariffs filed with the Commission that are

below a level which is just and reasonable, nor shall any such carrier establish or maintain unjust or unreasonable classifications, rules, or regulations in such tariffs. An unjust or unreasonable classification, rule, or regulation means one which results or is likely to result in the carriage or handling of cargo at rates or charges which are below a level which is just and reasonable. The Commission may at any time after notice and hearing, disapprove any rates, charges, classifications, rules, or regulations which the controlled carrier has failed to demonstrate to be just and reasonable. In any proceeding under this subsection, the burden of proof shall be on the controlled carrier to demonstrate that its rates, charges, classifications, rules, or regulations are just and reasonable. Rates, charges, classifications, rules, or regulations filed by a controlled carrier which have been rejected, suspended, or disapproved by the Commission are void, and their use is unlawful.

[(2) For the purpose of this subsection, in determining whether rates, charges, classifications, rules, or regulations by a controlled carrier are just and reasonable, the Commission may take into account appropriate factors, including, but not limited to, whether: (i) the rates or charges which have been filed or which would result from the pertinent classifcations, rules, or regulations are below a level which is fully compensatory to the controlled carrier based upon that carrier's actual costs or upon its constructive costs, which are hereby defined as the costs of another carrier, other than a controlled carrier, operating similar vessels and equipment in the same or a similar trade; (ii) the rates, charges, classifications, rules, or regulations are the same as or similar to those filed or assessed by other carriers in the same trade; (iii) the rates, charges, classifications, rules, or regulations are required to assure movement of particular cargo in the trade; or (iv) the rates, charges, classifications, rules, or regulations are required to maintain acceptable continuity, level, or quality of common carrier service to or from affected ports.

[(3) Notwithstanding the provisions of subsection (b)(2) of this section, rates, charges, classifications, rules, or regulations of controlled carriers shall not, without special permission of the Commission, become effective within less than thirty days following the date of filing with the Commission. Following the effective date of this subsection, each controlled carrier shall, upon the request of the Commission, file within twenty days of request, with respect to its existing or proposed rates, charges, classifications, rules, or regulations a statement of justification which sufficiently details the controlled carrier's need and purpose for such rates, charges, classifications, rules, or regulations, upon which the Commission may reasonably base its determination of the lawfulness thereof.

[(4) Whenever the Commission is of the opinion that the rates, charges, classifications, rules, or regulations filed by a controlled carrier may be unjust and unreasonable, the Commission may issue an order to the controlled carrier to show cause why such rates, charges, classifications, rules, or regulations should not be disapproved. Pending a determination as to their lawfulness in such a proceeding, the Commission may suspend such rates, charges, classifications, rules, or regulations at any time prior to their effective date. In the case of any rates, charges, classifica-

tions, rules, or regulations which have already become effective, the Commission may, upon the issuance of an order to show cause, suspend such rates, charges, classifications, rules, or regulations on not less than sixty days notice to the controlled carrier. No period of suspension hereunder may be greater than one hundred and eighty days. Whenever the Commission has suspended any rates, charges, classifications, rules, or regulations under this provision, the affected carrier may file new rates, charges, classifications, rules, or regulations to take effect immediately during the suspension period in lieu of the supended rates, charges, classificatins, rules, regulations: *Provided, however,* That the Commission may reject such new rates, charges, classifications, rules, or regulations if it is of the opinion that they are unjust and unreasonable.

[(5) Concurrently with the publication thereof, the Commission shall transmit to the President any order of suspension or final order of disapproval of rates, charges, classifications, rules, or regulations of a controlled carrier subject to the provisions of this subsection. Within ten days after the receipt or the effective date of such Commission order, whichever is later, the President may request the Commission in writing to stay the effect of the Commission's order if he finds that such stay is required for reasons of national defense or foreign policy which reasons shall be specified in the report. Notwithstanding any other provision of law, the Commission shall immediately grant such request by the issuance of an order in which the President's request shall be described. During any such stay, the President shall, whenever practicable, attempt to resolve the matter in controversy by negotiation with representatives of the applicable foreign governments.

[(6) The provisions of this subsection shall not apply to: (i) any controlled carrier of a state whose vessels are entitled by a treaty of the United States to receive national or most-favored-nation treatment; (ii) any controlled carrier of a state which, on the effective date of this subsection, has subscribed to the statement of shipping policy contained in note 1 to annex A of the Code of Liberalization of Current Invisible Operations, adopted by the Council of the Organization for Economic Cooperation and Development; (iii) rates, charges, classifications, rules, or regulations of any controlled carrier in any particular trade which are covered by an agreement approved under section 15 of this Act, other than an agreement in which all of the members are controlled carriers not otherwise excluded from the provisions of this subsection; (iv) rates, charges, classifications, rules, or regulations governing the transportation of cargo by a controlled carrier between the country by whose government it is owned or controlled, as defined herein, and the United States, or any of its districts, territories, or possessions; or (v) a trade served exclusively by controlled carriers.]

SECTION 20 OF THAT ACT

SEC. 20. That it shall be unlawful for any common carrier by water *in interstate commerce* or other person subject to this Act, or any officer, receiver, trustee, lessee, agent, or employee of such carrier or person, or for any other person authorized by such carrier or person to receive information, knowingly to disclose to or permit

to be acquired by any person other than the shipper or consignee, without the consent of such shipper or consignee, any information concerning the nature, kind, quantity, distination, consignee, or routing of any property tendered or delivered to such common carrier or other person subject to this act for transportation in interstate or foreign commerce, which information may be used to the detriment or prejudice of such shipper or consignee, or which may improperly disclose his business transactions to a competitor, or which may be used to the deteriment of prejudice of any carrier; and it shall also be unlawful for any person to solicit or knowingly receive any such information which may be so used.

Nothing in this Act shall be construed to prevent the giving of such information in response to any legal process issued under the authority of any court, or to any officer or agent of the Government of the United States, or of any State, Territory, District, or possession thereof, in the exercise of his powers, or to any officer or other duly authorized person seeking such information for the prosecution of persons charged with or suspected of crime, or to another carrier, or its duly authorized agent, for the purpose of adjusting mutual traffic accounts in the ordinary course of business of such carriers; or to prevent any common carrier by water *in interstate commerce* which is a party to a conference agreement approved pursuant to section 15 of this Act, or any other person subject to this Act, or any receiver, trustee, lessee, agent, or employee of such carrier or person, or any other person authorized by such carrier to receive information from giving information to the conference or any person, firm, corporation, or agency designated by the conference, or to prevent the conference or its designee from soliciting or receiving information for the purpose of determining whether a shipper or consignee has breached an agreement with the conference or its member lines or of determining whether a member of the conference has breached the conference agreement, or for the purpose of compiling statistics of cargo movement, but the use of such information for any other purpose prohibited by this Act or any other Act shall be unlawful.

SECTION 21 OF THAT ACT

SEC. 21. The Federal Maritime Commission and Secretary of Transportation may require any common carrier by water in interstate commerce or other person subject to this Act, or any officer, receiver, trustee, lessee, agent, or employee thereof, to file with it or him any periodical or special report, or any account, record, rate, or charge, or any memorandum of any facts and transactions appertaining to the business of such carrier or other person subject to this Act. Such report, account, record, rate, charge, or memorandum shall be under oath whenever the Commission or Secretary so requires, and shall be furnished in the form and within the time prescribed by the Commission or Secretary. Whoever fails to file any report, account, record, rate, charge, or memorandum as required by this section shall forfeit to the United States the sum of $100 for each day of such default.

Whoever willfully falsifies, destroys, mutilates, or alters any such report, account, record, rate, charge, or memorandum, or willfully

files a false report, account, record, rate, charge, or memorandum shall be guilty of a misdemeanor, and subject upon conviction to a fine of not more than $1,000, or imprisonment for not more than one year, or to both such fine and imprisonment.

(b) [The Commission shall require the chief executive officer of every vessel operating common carrier by water in foreign commerce and to the extent it deems feasible, may require any shipper, consignor, consignee, forwarder, broker, other carrier or other person subject to this Act] *The Commission may, to the extent it deems feasible, require any shipper, consignor, consignee, forwarder, broker, or other person subject to this Act,* to file a periodic, written certification under oath with the Commission attesting to—

(1) a policy prohibiting the payment, solicitation, or receipt of any rebate which is unlawful under the provisions of this Act;

(2) the fact that such policy has been promulgated recently to each owner, officer, employee, and agent thereof;

(3) the details of the efforts made, within the company or otherwise, to prevent or correct illegal rebating; and

(4) full cooperation with the Commission in its investigation of illegal rebating or refunds in United States foreign trades, and in its efforts to end such illegal practices.

The Commission may by regulation prescribe the form and content of any certification required under the authority of this subsection. Failure to file any such certification shall result in a civil penalty of not more than $5,000 for each day such violation continues.

SECTION 22 OF THAT ACT

SEC. 22. (a) That any person may file with the board a sworn complaint setting forth any violation of this Act by a common carrier by water *in interstate commerce,* or other person subject to this Act, and asking reparation for the injury, if any, caused thereby. The board shall furnish a copy of the complaint to such carrier or other person, who shall, within a reasonable time specified by the board satisfy the complaint or answer it in writing. If the complaint is not satisfied the board shall, except as otherwise provided in this Act, investigate it in such manner and by such means, and make such order as it deems proper. The board, if the complaint is filed within two years after the cause of action accrued, may direct the payment, on or before a day named, of full reparation to the complainant for the injury caused by such violation.

(b) The board, upon its own motion, may in like manner and with the same powers, investigate any violation of this Act.

[(c)(1) In addition to, and without limiting the authority granted to Commission by subsections (a) and (b) hereof, the Commission may, on its own motion, institute an adjudicatory investigation into possible violations of section 16 (other than paragraphs First and Third) involving rebates or refunds in foreign commerce or violations of section 18(b)(3) involving rebates or refunds, with the powers set forth in subsection (c)(2) hereof in addition to those already contained in sections 27, 43, and other sections of this Act.

[(2) Failure on the part of any common carrier, respondent to a proceeding instituted pursuant to subsection (c)(1), or any other person directly or indirectly controlling, controlled by, or under common control with such respondent carrier, to comply with any subpena or any duly issued order compelling an answer to interrogatories or to designated questions propounded by deposition or compelling production of documents in relation to any investigation conducted under subsection (c)(1), shall authorized the Commission to issue an order to show cause why any or all tariffs filed pursuant to section 18(b) of this Act, by or on behalf of the respondent carrier, or any or all rights of the respondent carrier to utilize such tariffs in the case of conference tariffs, should not be suspended until that carrier or any person directly or indirectly controlling, controlled by, or under common control with such carrier, has fully responded to the pertinent deposition, interrogatory, production request or motion, or subpena, and after such proceeding, to so suspend those tariffs or the respondent carrier's rights to utilize such tariffs. Any carrier whose tariff(s) or rights of use thereof have been suspended pursuant to this subparagraph and who accepts cargo for carriage during the suspension period which cargo otherwise would have been governed by the provisions of the suspended tariff(s) shall be subject to a civil penalty of not more than $50,000 for each shipment so accepted.

[(3) If, in defense of its failure to comply with a subpena or discovery order issued in relation to any investigation conducted under subsection (c)(1), a common carrier alleges documents or information are located in a foreign country and cannot be produced because of the laws of that country, the Commission shall immediately notify the Secretary of State of such failure to comply and of the allegation relating to foreign laws. Upon receiving such notification, the Secretary of State shall promptly consult with the government of the nation within which the documents or information are alleged to be located for the purpose of assisting the Commission in obtaining the documents or information sought.

[(4) Before any tariff suspension ordered pursuant to subsection (c)(2), or section 18(b)(7) of this Act, becomes effective, it shall be immediately submitted to the President who may, within ten days after receiving it, disapprove any such order if he finds that disapproval is required for reasons of the national defense or the foreign policy of the United States.]

SECTION 25 OF THAT ACT

SEC. 25. That the board may reverse, suspend, or modify, upon such notice and in such manner as it deems proper, any order made by it *under this Act.* Upon application of any party to a decision or order it may grant a rehearing of the same or any matter determined therein, but no such application for or allowance of a rehearing shall, except by special order of the board, operate as a stay of such order.

SECTION 26 OF THAT ACT

[SEC. 26. The Commission shall have power, and it shall be its duty whenever complaint shall be made to it, to investigate the

action of any foreign Government with respect to the privileges afforded and burdens imposed upon vessels of the United States engaged in foreign trade whenever it shall appear that the laws, regulations, or practices of any foreign Government operate in such a manner that vessels of the United States are not accorded equal privileges in foreign trade with vessels of such foreign countries or vessels of other foreign countries, either in trade to or from the ports of such foreign country or in respect of the passage or transportation through such foreign country of passengers or goods intended for shipment or transportation in such vessels of the United States, either to or from ports of such foreign country or to or from ports of other foreign countries. It shall be the duty of the Commission to report the results of its investigation to the President with its recommendations and the President is hereby authorized and empowered to secure by diplomatic action equal privileges for vessels of the United States engaged in such foreign trade. And if by such diplomatic action the President shall be unable to secure such equal privileges then the President shall advise Congress as to the facts and his conclusions by a special message, if deemed important in the public interest, in order that proper action may be taken thereon.]

SECTION 29 OF THAT ACT

SEC. 29. That in case of violation of any order of the board *Under this Act* the board, or any party injured by such violation, or the Attorney General, may apply to a district court having jurisdiction of the parties; and if, after hearing, the court determines that the order was regularly made and duly issued, it shall enforce obedience thereto by a writ of injunction or other proper process, mandatory or otherwise.

SECTION 30 OF THAT ACT

SEC. 30. That in case of violation of any order of the board *Under this Act* for the payment of reparation the person to whom such award was made may file in the district court for the district in which such person resides, or in which is located any office of the carrier or other person to whom the order was directed, or in which is located any point of call on a regular route operated by the carrier, or in any court of general jurisdiction of a State, Territory, District, or possession of the United States having jurisdiction of the parties, a petition or suit setting forth briefly the causes for which he claims damages and the order of the board in the premises.

In the district court the findings and order of the board shall be prima facie evidence of the facts therein stated, and the petitioner shall not be liable for costs, nor shall he be liable for costs of any subsequent stage of the proceedings unless they accrue upon his appeal. If a petitioner in a district court finally prevails, he shall be allowed a reasonable attorney's fee, to be taxed and collected as part of the costs of the suit.

All parties in whose favor the Board has made an award of reparation by a single order may be joined as plaintiffs, and all other parties to such order may be joined as defendants, in a single suit

in any district in which any one such plaintiff could maintain a suit against any one such defendant. Service of process against any such defendant and not found in that district may be made in any district in which is located any office of, or point of call on a regular route operated by, such defendant. Judgment may be entered in favor of any plaintiff against the defendant liable to that plaintiff.

No petition or suit for the enforcement of an order for the payment of reparation shall be maintained unless filed within one year from the date of the order.

SECTION 31 OF THAT ACT

SEC. 31. That the venue and procedure in the courts of the United States in suits brought to enforce, suspend, or set aside, in whole or in part, any order of the board *under this Act* shall, except as herein otherwise provided, be the same as in similar suits in regard to orders of the Interstate Commerce Commission, but such suits may also be maintained in any district court having jurisdiction of the parties.

SECTION 32 OF THAT ACT

SEC. 32. (a) That whoever violates any provision of sections 14 through 21 [and section 44] of this Act, except where a different penalty is provided, shall be subject to a civil penalty not to exceed $5,000 for each such violation.

(b) Whoever violates any provision of any other section of this Act, except where a different penalty is provided, shall be guilty of a misdemeanor, punishable by a fine not to exceed $5,000.

(c) Whoever violates any order, rule, or regulation of the Federal Maritime Commission made or issued in the exercise of its powers, duties, or functions, *under this Act* shall be subject to a civil penalty of not more than $1,000 for each day such violation continues.

(d) No penalty shall be imposed on any person for conspiracy after August 29, 1982: (1) to rebate or refund in violation of the initial paragraph or paragraph Second of section 16, or under section 18(b)(3) of this Act; or (2) to defraud the Commission by concealment of such rebates or refunds in any manner.

(e) Notwithstanding any other provision of law, the Commission shall have authority to assess or compromise all civil penalties provided in this Act: *Provided, however,* That, in order to assess such penalties a formal proceeding under section 22 of this Act shall be commenced within five years from the date when the violation occurred.

SECTION 44 OF THAT ACT

[SEC. 44. (a) No person shall engage in carrying on the business of forwarding as defined in this Act unless such person holds a license issued by the Federal Maritime Commission to engage in such business: *Provided, however,* That a person whose primary business is the sale of merchandise may dispatch shipments of such merchandise without a license.

[(b) A forwarder's license shall be issued to any qualified applicant therefor if it is found by the Commission that the applicant is,

or will be, an independent ocean freight forwarder as defined in this Act and is fit, willing, and able properly to carry on the business of forwarding and to conform to the provisions of this Act and the requirements, rules, and regulations of the Commission issued thereunder, and that the proposed forwarding business is, or will be, consistent with the national maritime policies declared in the Merchant Marine Act, 1936; otherwise such application shall be denied. Any independent ocean freight forwarder who, on the effective date of this Act, is carrying on the business of forwarding under a registration number issued by the Commission may continue such business for a period of one hundred and twenty days thereafter without a license, and if application for such license is made within such period, such forwarder may, under such regulations as the Commission shall prescribe, continue such business until otherwise ordered by the Commission.

[(c) The Commission shall prescribe reasonable rules and regulations to be observed by independent ocean freight forwarders and no such license shall be issued or remain in force unless such forwarder shall have furnished a bond or other security approved by the Commission in such form and amount as in the opinion of the Commission will insure financial responsibility and the supply of the services in accordance with contracts, agreements, or arrangements therefor.

[(d) Licenses shall be effective from the date specified therein, and shall remain in effect until suspended or terminated as herein provided. Any such license may, upon application of the holder thereof, in the discretion of the Commission, be amended or revoked, in whole or in part, or may upon complaint, or on the Commission's own initative, after notice and hearing, be suspended or revoked for willful failure to comply with any provision of this Act, or with any lawful order, rule, or regulation of the Commission promulgated thereunder.

[(e) A common carrier by water may compensate a person carrying on the business of forwarding to the extent of the value rendered such carrier in connection with any shipment dispatched on behalf of others when, and only when, such person is licensed hereunder and has performed with respect to such shipment the solicitation and securing of the cargo for the ship or the booking of, or otherwise arranging for space for, such cargo, and at lest two of the following services:

[(1) The coordination of the movement of the cargo to shipside;

[(2) The preparation and processing of the ocean bill of lading;

[(3) The preparation and processing of dock receipts or delivery orders;

[(4) The preparation and processing of consular documents or export declarations;

[(5) The payment of the ocean freight charges on such shipments;

Provided, however, That where a common carrier by water has paid, or has incurred an obligation to pay, either to an ocean freight broker or freight forwarder, separate compensation for the solicitation or securing of cargo for the ship or the booking of, or

otherwise arranging for space for, such cargo, then such carrier shall not be obligated to pay additional compensation for any other forwarding services rendered on the same cargo. Before any such compensation is paid to or received by any person carrying on the business of forwarding, such person shall, if he is qualified under the provisions of this paragraph to receive such compensation, certify in writing to the common carrier by water by which the shipment was dispatched that he is licensed by the Federal Maritime Commission as an independent ocean freight forwarder and that he performed the above specified services with respect to such shipment. Such carrier shall be entitled to rely on such certification unless it knows that the certification is incorrect.

[(f) Compensation from common carrier prohibited under certain circumstances. A forwarder may not receive compensation from a common carrier with respect to any shipment in which the forwarder has a beneficial interest or with respect to any shipment in which any holding company, subsidiary, affiliate, officer, director, agent, or executive of such forwarder has beneficial interest.]

SECTION 45 OF THAT ACT

SEC. 45. The provisions of this Act and of the Intercoastal Shipping Act, 1933, shall not apply to maritime labor agreements and all provisions of such agreements except to the extent that such provisions provide for the funding of collectively bargained fringe benefit obligations on other than a uniform man-hour basis, regardless of the cargo handled or type of vessel or equipment utilized. Notwithstanding the preceding sentence, nothing in this section shall be construed as providing an exemption from the provisions of this Act or of the Intercoastal Shipping Act, 1933, for any rates, charges, regulations, or practices of a common carrier by water *in interstate commerce* or other person subject to this Act which are required to be set forth in a tariff, whether or not such rates, charges, regulations, or practices arise out of, or are otherwise related to, a maritime labor agreement.

MERCHANT MARINE ACT, 1920

SECTION 20 OF THAT ACT

[SEC. 20. (1) That section 14 of the Shipping Act, 1916, as amended, is amended to read as follows: (See: Shipping Act, 1916, sec. 14).

[(2) The Shipping Act, 1916, as amended, is amended by inserting after section 14 a new section to read as follows: (See: Shipping Act, 1916, sec. 14a, supra).]

MERCHANT MARINE ACT, 1936

SECTION 212 OF THAT ACT

SEC. 212. The Commission is authorized and directed—

(a)–(d) * * *

[The Federal Maritime Commission is authorized and directed—

[(e) To investigate, under the regulatory powers transferred to it by this Act, any and all discriminatory rates, charges, classifications, and practices whereby exporters and shippers of

cargo originating in the United States are required by any common carrier by water in the foreign trade of the United States to pay a higher rate from any United States port to a foreign port than the rate charged by such carrier on similar cargo from such foreign port to such United States port, and recommend to Congress measures by which such discrimination may be corrected; and

[The Secretary of Transportation is authorized and directed—]

(f)–(g) * * *

SECTION 214 OF THAT ACT

[SEC. 214. (a) For the purpose of any investigation which, in the opinion of the Commission, is necessary and proper in carrying out the provisions of this Act, any member of the Commission, or any officer or employee thereof designated by it, is empowered to subpena witnesses, administer oaths and affirmations, take evidence, and require the production of any books, papers, or other documents which are relevant or material to the matter under investigation. Such attendance of witnesses and the production of such books, papers, or other documents may be required from any place in the United States or any Territory, district, or possession thereof at any designated place of hearing. Witnesses summoned before the Commission shall be paid the same fees and mileage that are paid witnesses in the Courts of the United States.

[(b) Upon failure of any person to obey a subpena issued by the Commission, it may invoke the aid of any District Court of the United States within the jurisdiction in which such person resides or carries on business in requiring the attendance and testimony of witnesses and the production of books, papers, or other documents. Any such court may issue an order requiring such person to appear before the Commission, or member, officer, or employee designated by the Commission, there to produce books, papers, or any other documents, if so ordered, or to give testimony touching the matter under investigation or in question. Any failure to obey such order of the court may be punished by such court as a contempt thereof. Any process in any such case may be served in the judicial district wherein such person resides or wherever he may be found.]

THE OMNIBUS BUDGET RECONCILIATION ACT OF 1981

SECTION 1608 OF THAT ACT

[SEC. 1608. (a) Section 1 of the Shipping Act, 1916 (39 Stat. 728), as amended (46 U.S.C. 801), is amended by striking at the end thereof the paragraph defining an independent ocean freight forwarder and inserting in lieu thereof the following: "The term 'independent ocean freight forwarder' means a person that is carrying on the business of forwarding for a consideration who is not a shipper, consignee, seller, or purchaser of shipments to foreign countries.".

[(b) Section 44 of the Shipping Act, 1916 (75 Stat. 552; 46 U.S.C. 841(b)), is amended by adding at the end thereof the following new subsection:

"(f) A forwarder may not receive compensation from a common carrier with respect to any shipment in which the forwarder has a beneficial interest or with respect to any shipment in which any holding company, subsidiary, affiliate, officer, director, agent, or executive of such forwarder has a beneficial interest.".

[(c) This section shall remain in effect until December 31, 1983, after which time the definition in section 1, Shipping Act, 1916, of 'independent ocean freight forwarder' shall read "An 'independent ocean freight forwarder' is a person carrying on the business of forwarding for a consideration who is not a shipper or consignee or a seller or purchaser of shipments to foreign countries, not has any beneficial interest therein, nor directly or indirectly controls or is controlled by such shipper or consignee or by any person having such a beneficial interest." By June 1, 1983, the Federal Maritime Commission shall submit a report to Congress evaluating the enforceability of this section and describing any reasons why this section should not be made permanent law.]

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